



Okoti v Parliament of Kenya & 2 others; County Government of Taita Taveta & 3 others (Interested Parties) (Petition 33 of 2021) [2024] KEELC 13321 (KLR) (19 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13321 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
PETITION 33 OF 2021
LL NAIKUNI, J
NOVEMBER 19, 2024**

IN THE MATTER OF: ARTICLES 1 (3) (C), 22(1) & 22 (C) 23, 48, 50 (1) 159, 162(2) (B) 165 (5) (B) & 6, 258 (1) & 259 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED VIOLATION OF ARTICLES 1, 2, 3(1) 4(20), 6 (1), 10,19, 20,21,24, 93 (2) , 94 (3), 129, 130, 131(1) (B) & 2 (A) & (B) 156, 188 AND 258 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE ALLEGED VIOLATION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 47 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: COMPELLING PARLIAMENT OF KENYA TO SET UP AN INDEPENDENT COMMISSION TO RESOLVE THE BOUNDARY DISPUTE BETWEEN TAITA TAVETA AND KWALE AND BETWEEN TAITA TAVETA AND MAKUENI AND COMPELLING THE NATIONAL GOVERNMENT TO SURVEY AND ERECT BEACONS TO CLEARLY DEMARCATHE THE BOUNDARIES IN ISSUE

-AND-

IN THE MATTER OF: THE DOCTRINE OF LEGITIMATE EXPECTATIONS

BETWEEN

OKIYA OMTATA OKOITI PETITIONER

AND

THE PARLIAMENT OF KENYA 1ST RESPONDENT

THE NATIONAL EXECUTIVE OF KENYA 2ND RESPONDENT



THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

AND

THE COUNTY GOVERNMENT OF TAITA TAVETA INTERESTED PARTY

THE COUNTY GOVERNMENT OF KWALE INTERESTED PARTY

THE COUNTY GOVERNMENT OF MAKUENI COUNTY INTERESTED PARTY

MINISTRY OF LANDS AND PHYSICAL PLANNING INTERESTED PARTY

Parliament should enact a law to establish an independent commission to resolve the county boundary disputes

The petitioner filed a constitutional petition seeking redress for long-standing boundary disputes between Taita Taveta County and its neighbours, Kwale and Makueni Counties. The petitioner was acting on complaints by 178 residents alleging harassment and double taxation in Mackinnon Road and Mtito Andei towns. The court referred the matter to the National Land Commission, which issued a report that the boundaries between the counties of Taita Taveta County and Kwale at Mackinnon Road Town shall be demarcated as prescribed in the Districts and Provinces Act of 1992 (repealed) and the Second Schedule of the repealed Act which the High Court adopted. The High Court also made recommendations that Parliament should consider implementing the provision of articles 94(3) and 188 of the Constitution by enacting an appropriate legislation and/or through amendment of the Districts and Provinces Act 1992 (repealed) and establish an independent commission to resolve the simmering boundary disputes affecting the 47 counties.

Reported by John Ribia

Jurisdiction – jurisdiction of the Environment and Land Court – jurisdiction to determine county boundary disputes - whether the Environment and Land Court had the jurisdiction to determine a dispute over the boundaries dispute facing the three Counties of Taita Taveta, Makueni and Kwale – Constitution of Kenya article 162(2)(b); Environment and Land Court Act, sections 3 and 13; Land Registration Act section 101; Land Act section 150.

Constitutional Law – cultural rights – cultural religious practices – cultural rights used in demarcating county boundaries - whether the demarcation of district and county boundaries at Mtito Andei pursuant to the repealed Districts and Provinces Act, 1992 (repealed) violated the economic and cultural rights of the Taita by excluding traditional shrines (fighis) and disregarding historical and customary boundary markers – Constitution of Kenya, article 11(a); Districts and Provinces Act of 1992 (repealed) sections 2, 5, and 16.

Devolution – county boundaries – dispute of county boundaries between Kwale, Taita Taveta and Makueni counties – dispute over jurisdiction of Mackinnon Road Town – dispute arising from double taxation of residents from multiple business owners – appropriate forum to resolve such a dispute - what was the appropriate forum for counties to resolve boundary disputes in the absence of legislation governing such disputes? - whether the High Court could adopt boundaries set in the Districts and Provinces Act 1992 (repealed) to resolve county boundary disputes - what were the boundaries for Taita Taveta County and Makueni County at Mtito Andei? - what were the boundaries for Taita Taveta County and Kwale county at Mackinnon Road Town? – Constitution of Kenya articles 2 (1) and (4), 27, 40, 67(1)(f), 162(2), 118, 188, and (3), and 209(5); repealed constitution section 27; Districts And Provinces Ac (repealed) second schedule.

Civil Practice and Procedure – constitutional petitions – interested parties – scope of their participation in a constitutional petition – where a petitioner sought reliefs against an interested party – where an interested party filed a cross petition - whether in a constitutional petition a petitioner could seek reliefs against an interested party -



whether a party on his/her/ its volition could sue a party as an interested party - Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 rules 7, 10(2), and 15(3).

Brief facts

The petitioner filed a constitutional petition on July 23, 2021, seeking redress for long-standing boundary disputes between Taita Taveta County and its neighbours, Kwale and Makueni Counties. The petitioner was acting on complaints by 178 residents alleging harassment and double taxation in Mackinnon Road and Mtito Andei towns, the petitioner challenged the failure by Parliament to enact legislation under article 188 of the Constitution to establish a commission for resolving county boundary disputes. He also faulted the national executive for failing to demarcate county boundaries by erecting visible beacons. The court stayed the main proceedings and referred the matter to the National Land Commission (NLC). Throughout the proceedings, interim orders were issued granting Taita Taveta County temporary administrative control over the disputed towns, with tax revenue held in joint accounts with the neighbouring counties.

Issues

- i. Whether the Environment and Land Court had the jurisdiction to determine a dispute over the boundaries dispute facing Taita Taveta, Makueni and Kwale Counties.
- ii. What were the boundaries for Taita Taveta County and Makueni County at Mtito Andei as well as for Taita Taveta County and Kwale county at Mackinnon Road Town?
- iii. Whether a petitioner could seek reliefs against an interested party in a constitutional petition.
- iv. Whether a party on its volition could sue a party as an interested party.
- v. What was the appropriate forum for counties to resolve boundary disputes in the absence of legislation governing such disputes?
- vi. Whether the High Court could adopt boundaries set in the Districts and Provinces Act 1992 (repealed) to resolve county boundary disputes.
- vii. Whether the demarcation of district and county boundaries at Mtito Andei pursuant to the repealed Districts and Provinces Act, 1992 (repealed) violated the economic and cultural rights of the Taita by excluding traditional shrines (*fighis*) and disregarding historical and customary boundary markers.

Held

1. Without jurisdiction, a court had no power to make any other step. The Environment and Land Court had the mandate to hear and determine disputes relating to the use, occupation and title to land. The ELC had previously ruled that it had jurisdiction over the boundaries dispute facing the three counties of Taita Taveta, Makueni and Kwale. As held earlier the instant court had jurisdiction to determine the matter.
2. Courts interpreted the Constitution in a manner that promoted its values and principles. The court must give a liberal interpretation and consideration to provisions of the Constitution and have regard to the language and wording of the Constitution and where there was no ambiguity, attempts to depart from the straight texts of the Constitution must be avoided. The Constitution must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
3. Constitutional violations must be pleaded with a reasonable degree of precision. The instant petition met the basic threshold of a constitutional petition.
4. The Constitution neither had provisions setting out the boundaries of the counties nor did it make reference to any other law. To arrive at the exact boundaries of the three counties, the High Court had to look at the relevant laws and texts. The Constitution should be given a purposive interpretation with all provisions being read as a whole and each provision sustaining the other.
5. The Districts and Provinces Act, 1992 (repealed) came into operation on June 26, 1992 and provided for divisions of Districts and Provinces. That could not be said to be *ultra vires* to the repealed constitution because, it was section 27 of the repealed constitution itself which in the year 1968, conferred the said powers upon an Act of Parliament, of which the 1992 Act was one, to otherwise



- provide. The court was not concerned about the administrative formalities but, the creation was lawful and within the ambit of the Act. Any breaches founded could not be sustained and any declarations related thereto could not be issued.
6. The county boundaries in place under the Constitution were based on the Districts and Provinces Act of 1992 (repealed). The petitioner sought a mandatory order compelling the National Executive to within twelve months from the date of the order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 counties as per the Districts and Provinces Act 1992 with preference being given to the boundaries between the Counties of Taita Taveta and Makueni on the one hand and the Counties of Taita Taveta county and Kwale on the other. The basis of the current county boundaries had its foundation under the Districts and Provinces Act (repealed).
 7. For the sake of attempting to resolve the existing boundary disputes facing the three counties the proceedings were stayed for six months, the court directed the petitioner to serve the orders to the National Land Commission (NLC) to initiate investigations into the historical injustices and instant county boundary disputes and prepare detailed report with practical and pragmatic recommendations on appropriate redress for its adoption and further directions. A joint team of surveyors confirmed the location of all beacons and natural features that mark the boundary between counties of Makueni and Taita Taveta as well as the boundary between Taita Taveta and Kwale. The joint team of surveyors unanimously reviewed and interpreted the Act with regard to contentious sections of the inter-county boundaries making reference to features described in the Act specifically second schedule under Makueni, Taita Taveta and Kwale. The report stated that there was no ambiguity as to the boundaries as drawn under the Act. The NLC made fourteen (14) findings and conclusions, further it made six (6) recommendations.
 8. Whereas the court was not bound by the NLC report, the report was persuasive. The court never got an opportunity to conduct site visits as provided for under order 18 rule 11 and/or order 40 rule 10 of the Civil Procedure Rules. The report offered extensive knowledge of the issues in question. The report was detailed with robust and pragmatic recommendations for redress. The joint team of surveyors unanimously agreed on the beacons and boundaries for the respective counties at Mtito Andei and Mackinnon Road Town which was not in dispute. The demarcation of the boundaries in issue would determine which county, between Taita Taveta and Makueni had jurisdiction over Mtito Andei Town; and which county, between Taita Taveta and Kwale, had jurisdiction over Mackinnon Road Town.
 9. The recommendation made by the NLC that the boundaries between the counties of Makueni and Taita Taveta at Mtito Andei Town and between Taita Taveta and Kwale Counties at Mackinnon shall be demarcated as prescribed in the Districts and Provinces Act of 1992 (repealed) and the Second Schedule of the repealed Act as outlined in the survey report as annexed to the report was legally sound. The joint survey team went to the ground and unanimously agreed on coordinates, beacons and physical features demarcating the boundaries. That would in turn achieve the second recommendation of ensuring that the residents of Mackinnon Road Town and Mtito Andei Town were not subjected to double taxation, the boundaries having been clearly demarcated. Recommendations numbers (c), (d), and (e) were outside the scope of the instant petition while recommendation number (f) was to be done as per the provision of article 188 of the Constitution. Parliament may consider enacting a legislation on that aspect.
 10. The NLC and the team in as far as the issues of the surveying and boundaries meting the three counties was concerned they were able to diligently and fully execute their mandate to the expectation of the court. There was room for exploitation especially on aspects of historical and anthropological perspectives of the region concerned in accordance with the provisions of article 67(1)(f) of the Constitution and which drew high expectations.
 11. The boundary dispute at Mtito Andei as codified in the Districts and Provinces Act of 1992 (repealed) followed colonial boundary demarcations which ignored the real and historical marked boundaries



- between the Taita people and Akamba people. The original boundary at Mtito Andei was a long the old – Nairobi highway. The boundary was also marked by traditional boundaries know as *fighis* which were cultural shrines of Taita people. Upon demarcation of the boundaries as per Districts and Provinces Act, the cultural shrines of the Taita people were curved away from the territory of Taita Taveta.
12. The Districts and Provinces Act (repealed) under which current boundaries were demarcated was unfair, unjust and unconstitutional as it violated the economic and cultural rights of Taita people by taking away *fighis* and shrines contrary to the provision of article 11 (a) of the Constitution. Sections 2, 5 and 16 of the Second Schedule of the repealed Act perpetuated historical injustices suffered by Taita people violated article 43 of the Constitution of Kenya, 2010 by taking away their rightful resources and vesting them in another county denying Taita Taveta revenue and services to the people.
 13. To the 1st Interested party, although the petition was drafted in a manner to make it seem like an inter-county boundary dispute petition which could be resolved by a tribunal under the provisions of article 118 of the Constitution, the dispute was not just about boundaries. It revolved around serious human rights violations stemming from historical injustices meted on the Taita people and the High Court had jurisdiction to handle. Owing to historical injustices, both the counties of Makueni and Kwale, formerly respective districts had been illegally collecting and levying taxes on residents of Taita Taveta thus leading to double taxation contrary to articles 27, 40 and 209 (5) of the Constitution.
 14. An Interested Party meant a person or entity that had an identifiable stake or legal interest or duty in the proceedings before the court but was not a party to the proceedings or may not be directly involved in the litigation.
 15. There were two ways in which a person could be enjoined in proceedings as an interested party under rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (*Mutunga* Rules). Either with leave of the court via a formal or oral application or the court on its own motion, was of the view that it would be in the interest that a party be joined to proceedings as an interested party. In that case the court would, *suo moto*, make an order for such a party to be joined.
 16. The petitioner in his own volition decided to include the County Governments of Taita Taveta, Kwale and Makueni as interested parties. Principally, the petitioner was also seeking substantive orders against the respondents although the issue in question affected the interested parties more than the respondents. However, as per rules 2 and 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, the petitioner had no right to sue a party as an interested party, it could only be against the respondent(s). Other parties would move the court or the court on its own motion could order a party to be added in the proceedings as an interested party.
 17. The County Governments of Taita Taveta, Kwale and Makueni were all interested parties. The court would proceed to treat them as interested parties. Rule 10(2) and 15(3) of the *Mutunga* Rules permitted the respondent to file a cross petition. There was no other provision under the Rules that permitted an interested party to file a cross petition.
 18. In every case, whether some parties were enjoined as interested parties or not, the issues to be determined by the court would always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court. One of the principles for admission of an interested party was that such a party must demonstrate that they had a stake in the matter before the court. That stake could not take the form of an altogether new issue to be introduced before the court.
 19. An interested party could not challenge the constitutionality of an Act of Parliament via a cross petition which was filed late in the day when the petition was at the verge of determination. The Attorney General and Parliament had not been granted the opportunity to respond to it effectively. The cross petition filed by the 1st interested party was incompetent and the same was struck out.



20. The 1st interested party was not satisfied with the county boundaries as they were. The 1st interested party intended to have Mackinnon Road Town and some acres of Mtito Andei under its administration. That could only happen by altering the boundaries of the counties. Article 188 of the Constitution was available to the 1st interested party so long as it was done in full compliance of the Constitution. The High Court exercised judicial restraint as the process contemplated under article 188 of the Constitution was reserved for the Parliament unless there were sufficient reasons for the court to intervene.
21. The boundaries of counties could not be altered by declaring the Districts and Provinces Act unconstitutional. Additionally, they could not be altered through declarations made by the court. They could only be altered through strict adherence to the Constitution. As per the constitutional architecture, a ward must be within a county. Several wards made up a county, further a constituency must be within a county, several constituencies made up a county and finally 47 counties made up Kenya.
22. Rule 2 of the National Land Commission (Investigation of Historical Land Injustices) Regulations applied to historical land injustices that occurred between the June 15, 1895 and August 27, 2010. In the instant case the 1st interested party was aggrieved by the decision of the National Land Commission. As per rule 28, a person aggrieved by the decision of the Commission could, within twenty eight days of the publication of the decisions, appeal to the Environment and Land Court. The instant case was not an appeal and therefore the court could not assume jurisdiction. The court could only exercise jurisdiction sitting on appeal against the decision of the National Land Commission.
23. The High Court was vested with constitutional authority to fashion appropriate reliefs as a remedy to peculiar circumstances arising. The court was the vanguard of the Constitution, it had all the authority under the sun so long as it was exercised in accordance with the Constitution. There was no relief that the High Court could not grant. The Constitution used the word “a court may grant appropriate relief, including”; the list provided was not exhaustive.
24. There were several disputes pitting counties in respect of boundaries. The court could not fold its hands particularly in the instant constitutional dispensation. Since the petitioner had strived to ensure that county boundaries in respect of all the 47 counties were demarcated and visible beacons placed, the court would only deal with the boundaries mentioned in the petition involving Taita Taveta and Makueni and Taita Taveta and Kwale. It was contrary to the Constitution and all the rules of natural justice to make orders affecting counties which were not part of the proceedings.
25. Parliament was urged to hasten the process of legislation on the issues. The court did not live in a vacuum. There had been several Bills which had previously been tabled before the Senate on county boundaries.

Petition partly allowed.

Orders

- i. *A declaration for the Parliament of Kenya was to consider implementing the provision of articles 94 (3) and 188 of the Constitution by enacting an appropriate legislation and/or through amendment of the Districts and Provinces Act 1992 (repealed) and to establish an independent commission to resolve the simmering boundary disputes affecting the 47 counties within the Republic of Kenya including and the one pitting the County of Taita Taveta against Makueni and Kwale Counties within the next twelve (12) months from the date of delivery of the Judgement.*
- ii. *The established independent Commissions working in close conjunction with the National Executive to undertake comprehensive and intensive land survey exercise and erect visible beacons clearly demarcating the boundaries of all the 47 counties within the Republic of Kenya in accordance with the newly legislated law and/or Amended Districts and Provinces Act 1992 (repealed).*
- iii. *The boundaries between Taita Taveta County and Kwale County at Mackinnon Road Town shall be demarcated as prescribed in the current legislation the Districts and Provinces Act of 1992 (repealed) and*



- the Second Schedule of the repealed Act as outlined in the comprehensive Land Survey Report as annexed to the report by the National Land Commission dated July 23, 2024.*
- iv. *The boundaries between the County of Makueni and Taita Taveta County at Mtito Andei Town shall be demarcated as prescribed in the Districts and Provinces Act of 1992 (repealed) and the Second Schedule of the repealed Act as outlined in the survey report as annexed to the report by the National Land Commission dated July 23, 2024 prepared by Joint survey team.*
 - v. *The counties of Taita Taveta, Kwale and Makueni shall issue permits and levy county taxes strictly within their respective boundaries as demarcated and prescribed in the Districts and Provinces Act of 1992 (repealed) and the second schedule of the repealed Act and outlined in the survey report as annexed to the report by the National Land Commission dated July 23, 2024 prepared by joint survey team.*
 - vi. *That the County Executive Committee Members of finance for the Counties of Taita Taveta, Makueni and Kwale ordered to jointly file comprehensive statement in court within 90 days stating the amount of money collected; in default each County Executive Member shall be at liberty to file individual report(s) for further orders of the court.*
 - vii. *The County Executive Committee Members of finance for Taita Taveta and Makueni Counties were to jointly file comprehensive statement in court within 90 days stating the amount of money collected; in default each County Executive Member shall be at liberty to file individual report(s) for further orders of the court.*
 - viii. *The matter would be mentioned on March 13, 2025 to ascertain compliance with the court's directions, to receive reports progress made and for other incidental occurrences and any further directions.*
 - ix. *The cross petition by the 1st interested party dated September 18, 2024 was found to be incompetent thus struck out in entirety with no orders as to costs.*
 - x. *Each party was at liberty to move the court seeking any appropriate reliefs whatsoever.*
 - xi. *Each party was to bear their own costs.*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Followed)
2. *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others; Nature Foundation Limited (Proposed Interested Party)* Petition 14 of 2014; [2014] KESC 52 (KLR) - (Applied)
3. *Council of County Governors v Senate & 3 others* Petition 11 of 2014; [2014] KEHC 2218 (KLR) - (Applied)
4. *Kenya Commercial Bank Limited & another v Samuel Kamau Macharia & 2 others* Civil Appeal 181 of 2004; [2008] KECA 334 (KLR) - (Applied)
5. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal No 290 of 2012; [2013] eKLR - (Applied)
6. *Methodist Church in Kenya v Fugicha & 3 others* Petition 16 of 2016; [2019] KESC 59 (KLR) - (Applied)
7. *Michuki, John N & another v Attorney-General & 2 others* Miscellaneous Application 975 of 2001; [2002] KEHC 1195 (KLR) - (Applied)
8. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Applied)
9. *National Land Commission v Attorney General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)* Reference 2 of 2014; [2014] KESC 10 (KLR) - (Applied)
10. *Ngayu, Cecilia Karuru v Barclays Bank of Kenya & another* Civil Case 17 of 2014; [2016] KEHC 7064 (KLR) - (Applied)
11. *Owners Of The Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR) - (Applied)



12. *Rai, Jasbir Singh & 3 others v Tarlocabn Singh Rai & 4 others* Civil Application 307 of 2003; [2007] KECA 21 (KLR) - (Applied)
13. *Shadrack, Jasper Ndeke v Director of Public Prosecutions & 6 others* Petition 507 of 2019; [2021] KEHC 12717 (KLR) - (Applied)
14. *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* Petition 229 of 2012; [2012] KEHC 2480 (KLR) - (Applied)

Tanzania

Tinyefunza v Attorney General of Uganda Constitutional Petition No 1 of 1997 [1997] UGCC 3 - (Explained)

South Africa

State v Acheson [1991] 20 SA 805 - (Applied)

United Kingdom

Minister for Home Affairs & another v Fischer [1979] 3 All ER 21 - (Explained)

Canada

David Dunsmuir v New Brunswick (2008) 1 SCR 190 - (Applied)

Texts

Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn

Statutes

Kenya

1. Civil Procedure Act (cap 21) section 27 (1) - (Interpreted)
2. Civil Procedure Rules, 2010 (cap 21 sub leg) order 40 rule 10 (Interpreted)
3. Constitution article 1, 2, 3, 4(2), 6(1), 10, Chapter 4 on articles 19(1)(3), 20(2) (4) 21(1), 22, 23, 24, 25, 27(1)(2), 40, 47, 50 (1) 93, (3) 188(1)(2), 159(1)(2), 160(1), 162(2)(b), 165(5)(b) 165 (6) 258 and 259 (1) - (Interpreted)
4. County Governments Act (cap 265) In general - (Cited)
5. Districts and Provinces Act (cap 105A) In general - (Cited)
6. Environment And Land Court Act, 2011 (Act No 19 of 2011) section 3, 13(2) - (Interpreted)
7. Evidence Act (cap 80) In general - (Cited)
8. Intergovernmental Relations Act (cap 265F) In general - (Cited)
9. Land Act, 2012 (Act No 6 of 2012) section 150 - (Interpreted)
10. Land Registration Act, 2012 (Act No 3 of 2012) section 10 - (Interpreted)
11. National Land Commission (Investigation Of Historical Land Injustices) Regulations, 2017 (cap 281 Sub Leg) regulation 2 - (Interpreted)
12. National Land Commission Act (cap 281) section 15 - (Interpreted)
13. The Constitution of Kenya (Protection Of Rights and Fundamental Freedoms) Practice And Procedure Rules, 2013 (Constitution Sub Leg) In general - (Cited)

Instruments

1. African Charter on Human and Peoples' Rights (Banjul Charter), 1981
2. International Covenant on Civil and Political Rights (ICCPR), 1966

Advocates

M/s. Sharon Mutua for 1st Respondent.



Mr. Mwangi & Mr. Kipngetich for 1st Interested Party.
Mr. Nyamodi for 2nd Interested Party.
Mr. Eric Mutua for 3rd Interested Party
Mr. Penda for 2nd, 3rd Respondents & 4th interested Party

JUDGMENT

I. Preliminaries.

1. This is a judgement whereby the honourable court was moved by Mr Okiya Omtatah Okoiti, the petitioner herein, through filing of a constitution petition dated July 19, 2021 and filed in court on July 23, 2021 (Hereinafter referred to as “The Petition”). It was against the 1st, 2nd and 3rd respondents herein while it also joined the 1st, 2nd, 3rd and 4th interested parties herein and whom variably took certain independent position in support and against the filed petition.
2. The petition was dint on the petition is stated to be based on articles 1, 2, 3, 4(2) , 6(1), 10, Chapter 4 on articles 19(1)(3) , 20(2) (4) 21(1) , 22, 23, 24, 25, 27(1)(2) , 40, 47, 50 (1) 93, (3) 188(1)(2), 159(1) (2), 160(1), 162(2)(b), 165(5)(b) 165 (6) 258 and 259 (1). Upon Service all parties filed responses and Preliminary objections. Undoubtedly, from inception todate, this has been such a long and gruesome legal journey but which has now finally come to end based on the legal maxim – “Litigation must come to a conclusion”. Indeed, as shall seen, in the course of proceedings and based on the Doctrine of Exhaustion pursuant to the provision of article 67(1)(e) of the Constitution of Kenya, 2010, (Hereinafter referred to as “The Constitution”) the court referred the matter to a constitutionally established body the National Land Commission with clear terms of reference primarily being to conduct investigation pertaining to historical injustices with regard to boundaries affecting the three Counties herein – Makueni, Kwale and Taita Tavetta respectively. Indeed, albeit slightly protracted, but they effectively and efficiently executed that mandate with such resilience, zeal and dedication. Subsequently, they rendered its decision contained in a report this court will be relying on in the course of the deliberation of this Judgement herein.
3. At the sametime, it is imperative that the honourable court embarks on a bit of historical background of the matter prior to dealing with the substantive issues pertaining to the said Petition. From the record, it will be noted that the proceedings have been marred with myriad of interlocutory applications whereby then honourable court has had to deliver various rulings in between. Thus, for clarity sake and ease of reference, it is important to set out the said rulings on the several applications filed by parties herein. Fundamentally, being a court of record, the said rulings delivered will become relevant as the Judgement unfolds and progresses going forward.
4. To begin with, through on March 23, 2023 this court rendered itself on notice of preliminary objection raised by the 2nd, 3rd respondents, the Senate, the 3rd and 4th interested parties dated September 4, 2021, 19th October and October 21, 2021 respectively verbatim as follows:-
 - a. That this honourable court has original and unlimited Jurisdiction under the provisions of article 162(2)(b) of the Constitution, sections 3 & 13 of the Environment & Land Court Act No 19 of 2011, sections 101 of the Land Registration Act, No 3 of the 2012 and section 150 of the Land Act, No 6 of the 2012 to hear and determine the issues raised herein this petition and hence to that extent the preliminary objection raised by the respondents and the interested parties is disallowed for being unmeritorious.



- b. That for the sake of attempting to resolve the existing boundaries dispute facing the three Counties of Taita Taveta, Makueni and Kwale, under the circumstances where there exists no clear legal mechanisms to do so, the instant proceedings are stayed for a period of Six (6) months from the date of this ruling.
 - c. That in the meantime, the petitioner be and is hereby directed to immediately serve this orders upon the National Land Commission lodge a formal complaint with the National Land Commission to enable them initiate investigations into the historical injustices and the instant county boundary dispute involving these three Counties prepare a detailed report with practical and pragmatic recommendations on the appropriate redress to resolve the said County boundary dispute once and for all.
 - d. That in the petitioner be and is hereby directed to immediately within the next seven (7) days from the date of this ruling extract and serve this orders upon the National Land Commission for their action thereof.
 - e. That upon service the Chairman and the Secretary to the National Land Commission be and are hereby directed to file a comprehensive report on the said three County Boundaries before this honourable court on its recommendations and appropriate redress within the next seven (7) days after its preparation for its adoption by court and further direction;
 - f. That in the meanwhile, there be interim orders appointing and/or authorizing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mackinnon Road Town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the County Government of Kwale for a period of six (6) months from the date of this ruling.
 - g. That interim order appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei town just as its predecessor did before the establishment of county governments in 2013 and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the County Government of Makueni.
 - h. That this matter to be mentioned on October 10, 2021 for purposes of compliance by the National Land Commission, ascertainment of the progress and taking further directions with regard to the disposal of the main petition hereof.
 - i. That this being a matter of great public interest and still at the very initial stages there is no orders as to costs.
5. Further to this, on June 6, 2023, this court again rendered itself as follows:-
- a. That both notice of motion applications dated 4th and January 5, 2023 by the 2nd and 3rd Interested parties respectively be and hereby partially allowed to the extend in terms of prayers d, e and f of the application dated January 4, 2024 and prayer c of the application dated January 5, 2023 as stated herein below.
 - b. That the order issued on November 10, 2022 that the notice of motion application dated July 19, 2021 be and is hereby compromised on condition that the conservatory orders granted on September 20, 2021 be sustained and / or maintained until the main petition is heard and determined in order to pave way and hence expedite the hearing and final determination of the petition ne and is hereby set aside.



- c. That notice of motion application dated July 19, 2021 to be canvassed by way of written submissions through stringent timeframes as follows:-
 - i. The 1st, 2nd and 3rd respondents and the 1st, 2nd and 3rd interested parties be granted 14 days leave to file and serve replies and written submissions after having been served with the petitioners submissions.
 - ii. The petitioner/ applicant granted 14 days leave to file and serve further affidavit to the new issues raised from the responses and written submissions
 - iii. There be inter parties hearing on July 19, 2023 (highlighting of submissions) and taking a ruling date
 - d. That pending hearing and determination of the petitioner’s application dated July 19, 2021,
 - i. A conservatory/ interim order already in force is and hereby extended appointing and/ or authorizing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mackinnon road and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the county government of Kwale for a period.
 - ii. A conservatory/ interim order already in force is and hereby extended appointing the county government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei town just as its predecessor did before the establishment of county governments in 2013 and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the county government of Makueni.
 - e. That the County Executive Committee members finance for Taita Taveta and Kwale Counties do jointly open a bank account within 14 days of this ruling and come up with a framework to collect taxes as above.
 - f. That the County Executive Committee Members finance for Taita Taveta and Makueni Counties do jointly open a bank account within 14 days of this ruling and come up with a framework to collect taxes as above.
 - g. That the order issued on March 23, 2022 directing the National Land Commission to hear and determine all historical injustices pursuant to the provisions of article 67(1)(e) of the Constitution pertaining to the county boundaries involving the county of Makueni, Kwale and Taita Taveta to continue but within a given timeframe unless otherwise not beyond December 31, 2023
 - h. That the Deputy Registrar of the court do serve a copy of this ruling upon the Speaker of the Senate to consider fast tracking the enactment of the County Boundaries Bill into a legislation and the Chairman through the Secretary/ Chief Executive officer, the National Land Commission for effecting therein
 - i. That each party to bear their own costs.
6. On February 12, 2024, this court again delivered another ruling. The court delivered itself, “*inter alia*”:-
- a. That the notice of motion application dated December 18, 2023 has merit and hence be and is hereby allowed whereby the time for the accomplishment of the orders made out in court



on March 23, 2022 to the National Land Commission be extended from December 31, 2023 to April 15, 2024.

- b. That the notice of motion application dated July 19, 2021 has merit and hence its allowed as prayed under the terms and conditions stated herein.
 - c. That pending hearing and determination of the petition a conservatory order be and is and hereby issued thus: -
 - i. The appointing the County Government of Taita Taveta to be the sole authority issuing permits and levying county taxes in Mackinnon Road Town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with Kwale County government.
 - ii. The appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtitio Andei town just as its predecessor did before the establishment of County Governments in the year 2013, and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the Makueni County Government.
 - iii. An order of prohibition prohibiting the County Government of Kwale and its agents from collecting revenue in anyway whatsoever or howsoever in Mackinnon Town where its predecessor did not collect revenue before establishment of County Governments.
 - iv. An order of prohibition prohibiting the County Government of Makueni and its agents from collecting revenues in anyway whatsoever or howsoever in Mtitio Andei where its predecessor did Not collect revenues before establishment of the County Governments.
 - d. That an order made with stringent time frame towards the expeditious disposal off the main petition by way of affidavits/written submissions as follows: -
 - i. The matter to be mentioned on April 22, 2024 to ascertain full compliance and affirm the directions and orders of this court.
 - ii. The petitioner/applicant granted 21 days leave with effect from April 22, 2024 to file and serve written submissions.
 - iii. Thereafter, the 1st, 2nd and 3rd respondents; the 1st, 2nd and 3rd interested parties granted 14 days leave to file and serve their written submissions.
 - iv. Each party be granted 10 minutes opportunity to highlight the submissions on June 6, 2024.
 - e. That the judgement of the main petition to be delivered on June 26, 2024.
 - f. That there shall be no order as to costs.
7. As indicated, in the fullness of time, these decisions will have a far reaching effect to the Judgement herein.



II. Parties in the Petition.

8. Now turning to the petition, “per excellence”. Based on the filed pleadings, the petitioner acting in person, describes himself as a law-abiding citizen, a public spirited individual, a human rights defender, a strong believer in the rule of law and constitutionalism. The Petitioner states that he is a member of Kenyans for Justice and development trust which trust is incorporated in Kenya whose purposes is to promote democratic governance, economic development and prosperity. This court is also aware that the Petitioner is the Senator for Busia County.
9. The 1st respondent is the Parliament of Kenya which comprises of the National Assembly and the Senate. Parliament is the legislative arm of government. The 2nd respondent is the national executive arm of the government. The 3rd respondent is the Honourable Attorney General the principal advisor to the Government as per article 156 of the Constitution.
10. The 1st, 2nd and 3rd interested parties are the County Governments of Taita Taveta, Kwale and Makueni respectively. They are established under the provisions of article 176 of the Constitution and further given effect under the County Governments Act of 2012. The 4th interested party is the Ministry of Lands and Physical Planning which is a government ministry responsible for overseeing land administration, management, and policy development in Kenya.

III. Reliefs sought in the Petition.

11. The petitioner filed the instant petition dated July 19, 2021 and filed on July 23, 2021 seeking the following orders (rephrased to avoid appearing as court orders)
 - a. A declaration that forcing the residents of Mtito Andei and Mackinnon Road towns to pay double taxes is a gross violation of the affected traders property rights under article 40 (3) of the Constitution
 - b. A declaration that the double taxation of the residents of Mtito Andei and Mackinnon Road towns violates article 47(1) of the Constitution.
 - c. A declaration that the Parliament of Kenya should set up an independent commission to resolve the simmering boundary disputes pitting Taita Taveta County against Makueni and Kwale Counties
 - d. A declaration that Parliament of Kenya should enact enabling legislation to implement articles 94(3) and 188 of the Constitution.
 - e. A declaration that the national executive of Kenya has failed to lessen county boundary disputes by surveying and erecting visible beacons to clearly demarcate the boundaries of Kenya’s 47 counties, pursuant to articles 129, 130, 131(1)(b) and 2(a) and (b) as read together with articles 6(1) and the first schedule to the Constitution.
 - f. A declaration that the national executive of Kenya should survey and erect visible beacons to clearly demarcate the boundaries of Kenya’s 47 counties pursuant to articles 129, 130, 131(1) (b) and 2(a) and (b) as read together with articles 6(1) and the first schedule to the Constitution.
 - g. A mandatory order compelling parliament of Kenya to set up within three from the date of this order, an independent commission to resolve the simmering boundary disputes pitting Taita Taveta county against Makueni and Kwale Counties



- h. A mandatory order compelling parliament after the boundary disputes have been resolved to direct how county governments of Taita Taveta, Makueni and Kwale will utilize the money held in joint accounts opened for revenue collections in Mackinnon Road and Mtito Andei as ordered by the court at the beginning of the proceedings.
- i. A mandatory order compelling the Parliament of Kenya to enact within 6 months from the date of this order enabling legislation to implement articles 94(3) and 188 of the Constitution
- j. A mandatory order compelling the National Executive to within twelve months from the date of the order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 counties as per the Districts and Provinces Act 1992 with preference being given to the boundaries between Taita Taveta County and Makueni County on the one hand and Taita Taveta county and Kwale county on the other.
- k. A mandatory order compelling the national executive and Parliament of Kenya to file in this court affidavits demonstrating compliance with court orders at the expiry of the periods within which they have been ordered to act
- l. A mandatory order compelling the respondents to pay the petitioners costs of the petition
- m. Any other or further remedy that the court deems fit to grant.

IV. The Petitioner's Case.

- 12. The petition was premised on the grounds, testimonial facts and averments made out of the 31 grounds of Okiya Omtatah Okoiti, the petitioner sworn and dated on July 19, 2021. The affidavit consisted of annexures marked as "Exhibits – 001" annexed thereto being a copy of a letter from residents of Taita Taveta County dated July 12, 2021; affidavits sworn by David Tole, Duncan Kamau, Pius Mwakale, Gibson Mapesa, and Stephen Ngutwa and a report by the boundary Committee for the Cuntly Government of Taita Taveta.
- 13. The petitioner states that, as his instruction to act, he received a letter signed by 178 residents of the County of Taita Taveta claiming harassment by the County Governments of Kwale and Makueni in Mackinnon Road Town and Mtito Andei town thus inviting the court to intervene and compel Parliament to enact legislation to resolve simmering boundary disputes pitting the County of Taita Taveta against the County of Makueni on one hand and the County of Taita Taveta on the other hand. The petitioner also sought the national executive to survey and erect visible beacons to clearly demarcate the boundaries of Kenya's forty-seven counties with preference being given to the boundaries between the County of Taita Taveta and Makueni on one hand and the County of Taita Taveta against Kwale on the other hand. It was the petitioner's case that since the law on county boundaries was clear and there was enough documentary evidence to resolve them.
- 14. The petitioner averred that 178 residents of the County of Taita Taveta County asked him to intervene and find a solution to boundary disputes which had been simmering for a long time since pre independence days between what was today's the Counties of Taita Taveta, Kwale and Makueni. In the letter there were five affidavits and a copy of the boundary committee report prepared in the year 2015 by the County of Taita Taveta. The petitioner asserted that the residents of the two towns and their environment were complaining of harassment by officials from the said counties competing for control of the towns. In particular the residents were forced to pay taxes twice to different counties and due to the confusion. Hence, arising from that they did not know from which county they should demand services and accountability for taxes they pay.



15. According to the petitioner, as per the boundary committee report, the County of Taita Taveta (formerly Taita District under the repealed Constitution) had had long standing boundary disputes with the Counties of Kwale and Makueni (formerly Kwale and Makueni districts) and all previous efforts to resolve them had failed. In particular there was a boundary dispute between the Counties of Taita Taveta and Makueni over the location of Mtito Andei Town which lied on what used to be the boundary between the former Provinces of Coast and Eastern in the repealed Constitution. Whereas the County of Makueni claimed that the entire town belonged to it, Taita Taveta on the other hand claimed that part of the town belonged to it pursuant to existing documentation and recent history.
16. Further, there was also a boundary dispute between the County of Taita Taveta County and Kwale over the location of Mackinnon Road Town, which was gazetted in the year 1947 as was part of Taita until the year 1961 when a colonial District Commissioner (DC) for Taita District called AF Walker who was based in Voi Town wrote to then Coast Provincial Commissioner requesting to transfer it to Kwale District citing administrative challenges. The move was heavily criticized and resisted by residents of the town and by political leadership of Taita district and within six months was reversed. However, because it had already been gazetted, it required the following years (1962) boundary review commission to correct the anomaly and de gazette the transfer. Unfortunately, to date the transfer had not been degazetted resulting in the current boundary dispute between the two mentioned Counties. Additionally, there were no beacons clearly demarcating the boundaries between the Counties of Taita Taveta and Kwale and Taita Taveta and Makueni.
17. According to the petitioner, the two boundary disputes never just concerned the actual boundaries of the County of Taita Taveta but were also based on the allegations that the current county boundaries were unfair. This was because they were based on historical injustices. At the centre of the disputed towns was who collected taxes. The disputes were said to have created tension, agony and trauma among the people on the ground and had the potential of turning violent at the year 2022 Presidential, Senator, Governor & Women representative general elections leading to loss of numerous lives and livelihood. Thus, if it was left unresolved, these disputes had the potential of undermining the objects of devolution and national security calling for urgent action by parliament.
18. Further, it was the petitioners' case that the Constitution provides clear, elaborate, inclusive and complex but secure procedure in the provision of article 188 for altering the boundaries of counties which would resolve the current boundary disputes pitting the Counties of Taita Taveta against Kwale and Makueni. The petitioner stated that whereas the mandate to adjudicate issues touching on boundary disputes vested in the Independent commission set up as provided under the provision of article 188 of the Constitution which provides proper procedure for amending boundaries of counties, Parliament had not set up an independent commission required to look into the boundary disputes between the counties. Thus, the petitioner held that and recommended the way forward was for the court to make specific orders to Parliament as a wake up call. To the petitioner Parliament was sleeping on its job.
19. The petitioner re – emphasised on this point. He asserted that being was aggrieved that several years after the promulgation of the Constitution on August 27, 2010 Parliament had not set up the Independent Commission under the provision of articles 94(3) and 188(2) of the Constitution. The Executive was faulted for having failed to survey and erect visible beacons to clearly demarcate the 47 counties within the Republic of Kenya. Additionally, it was said that Parliament had not enacted a law that would adjudicate disputes concerning county boundaries comprehensively and enabling legislation to implement the provision of article 188 which needed to be enacted. The petitioner took issues that whereas the Standing Orders 69(1)(b)(vi) for the Senate and the Standing Order 61(b)(x) for the National Assembly provided for special motion to be moved in respective houses pursuant to the



provision of article 188 for alteration of the boundaries of a county. He added that the Standing Order 225 for the Senate and Standing Order 219 for the National Assembly provided that a petition meant written prayer to the respective house under the provision of article 37 or 119 of the Constitution by a member of public requesting the house to consider any matter in its authority. There was no provision in law for a member of the public like the petitioner to petition the entire parliament as a single body pursuant to the provision of article 94(3) to set up the independent commission under the provision of article 188(1).

20. The Petitioner posited that these disputes ought not to be there since the law was clear and there were historical maps and documents which showed where the boundaries ought to be and parliament had the legal mandate to resolve them under the provision of articles 94(3) and 188 of the Constitution. The petitioner was aggrieved that since the constitution was promulgated the national government had failed to lessen the county boundary disputes by surveying and erecting beacons to clearly demarcate boundaries of 47 counties within the Republic of Kenya pursuant to the provision of articles 129, 130, 131, 91)(1)(b) and (2)(a) and (b) and the First Schedule of the Constitution and prayed for compelling orders to the national executive to survey and erect visible beacons to clearly demarcate the boundaries of Kenya's forty seven (47) counties with preference given to the three counties. In conclusion, the Petitioner also prayed for costs of the Petition.

V. Constitutional foundations of the Petition.

21. As already indicated above, the petition was based on the dint of the provision of articles 1, 2, 3, 4(2), 6(1), 10, Chapter 4 on article 19(1)(3), 20(2)(4), 21(1), 22, 23, 24, 25, 27(1), (2), 40, 47, 50(1) 93, (3) 188(1)(2), 159(1)(2), 160(1), 162(2)(b), 165(5)(b), 165(6), 258, 259 (1). The petitioner also placed reliance on the provision of Section 6 of the Provinces and Districts Act, Kenya Colony and Protectorate (boundaries) Orders in Council of 1921, the Legal Notice number 207 Kenya Gazette supplement no 34 of May 12, 1959, the Legal Notice Numbers 386 published in the Kenya gazette supplement no 51 of July 14, 1961 which was said to have irregularly transferred Mackinnon Road Town from Taita Taveta to Kwale District.
22. The complaints lodged by the petitioner was that there were wanton violations of the constitution where by the residents of Mrito Andei and Mackinnon Road were compelled to pay double taxes to all these Counties in gross violation of the provision of articles 40 (3) and 47(1) of the Constitution meted by the said double taxation to law abiding Citizens of Kenya. Parliament was blamed for being on slumber and in failing to set up independent commission in contravention of the provision of articles 94 (3) and 188. Whist, the executive was also said to have failed to survey and erect visible beacons to clearly demarcate the Kenya's forty seven counties as per the provisions and tenets of the Districts and Provinces Act of 1992.

VI. Responses to the Petition by the 1st Interested Party.

23. The 1st interested party through the Law firm of Messrs. Manasses Mwangi and Associates filed response to the petition dated September 18, 2024. In essence, the 1st Interested party by and large wholly supported the petition. The 1st interested party averred that from a historical view – point, there had been long standing boundary dispute between people of the Counties of Taita Taveta and Kwale at Mackinnon Road Town as well as the Counties of Taita Taveta and Makueni at Mtito Andei as a result of unjust colonial laws and proclamations which were also continued after Kenya attained independence. The boundary dispute at Mackinnon Road Town arose in the year 1961 when the colonial District Commissioner for Taita Taveta County, formerly Taita Taveta District wrote a letter to the District Commissioner of Kwale purporting to transfer the whole of Mackinnon road town



to Kwale. The transfer of administration of Mackinnon Road Town to Kwale was forcefully made without any consultation with the inhabitants of the area. Upon learning of transfer of Mackinnon Road Town to Kwale the residents of Mackinnon Road agitated for reversal of transfer. There were public barazas held in which people opposed the transfer. After facing a lot of resistance from the residents, the District Commissioner and the then Coast Provincial Commissioner acceded to demands of residents and reversed the transfer. Since the transfer had been earlier gazetted, the reversal was also to be gazetted but this never happened and thus the main cause to the recurrent boundaries dispute. As a result of transfer of Mackinnon Road Town to Kwale and subsequent reversal of the transfer back to Taita Taveta a historical injustice was visited upon the people of Taita Taveta because people were evicted from their lands to pave way for construction of schools, churches and even military barracks.

24. The boundary dispute at Mtito Andei as codified in the *Districts and Provinces Act* 1992 followed colonial boundary demarcations which ignored the real and historical marked boundaries between the Taita people and Akamba people. The original boundary at Mtito Andei was a long the old – Nairobi highway. The boundary was also marked by traditional boundaries known as “fighis” which were cultural shrines of Taita People. Upon demarcation of the boundaries as per districts and provinces act, the cultural shrines of the Taita people were curved away from the territory of Taita Taveta. The 1st Interested Party states there was need to resolve the county boundary disputes and address the historical injustices that resulted from the current boundary demarcation to conform with the Constitution.
25. It was the 1st interested party’s case that the Districts and Provinces Act whereby the current boundaries were demarcated was unfair, unjust and unconstitutional as it violated the economic and cultural rights of Taita people by taking away fighis and shrines contrary to the provision of article 11(a) of the Constitution. The provision of sections 2, 5 and 16 of the Second Schedule of the Act perpetuates historical injustices suffered by Taita people and which violated the provision of article 43 by taking away their rightful resources and vesting them in another county denying Taita Taveta revenue and services to the people. To the 1st Interested Party, although the petition was couched in a manner to appear like inter county boundary dispute which should be resolved by a tribunal under the provision of article 118 of the Constitution, the dispute was not just about boundaries. The dispute revolved around serious human rights violations stemming from historical injustices meted on Taita people and this court has jurisdiction to handle. Owing to the historical injustices both Counties of Makueni and Kwale, formerly respective districts had been illegally collecting and levying taxes on residents of Taita Taveta thus leading to double taxation contrary to the provision of articles 27, 40 and 209(5). The 1st interested party prayed the honourable to allow the petition as modified in the cross - petition.

VII. The Cross – Petition by the 1st Interested Party.

26. At the same time, the 1st interested party filed a cross - petition placing reliance on the preamble, the provision of articles 2(5), (6), 11, 21(3) 21(4), 22(1), 23(1), 27, 40(2), 44, 165 of the Constitution and the African Charter on Human Rights, On International Covenant on Civil and Political rights and international covenant on Economic, social and cultural rights. The 1st interested party/cross petitioner stated that the township of Mackinnon road town and whole of Taru up to Mbele were part of Taita Taveta. Mtito Andeyi, Mtito Andei were part of Taita Taveta. Conservancy comprising of 4000 Hectares of land otherwise referred to as Rombo conservancy bordering Kajiado County to the south western boundary was part of Taita Taveta.
27. The boundary of Taita Taveta was marked and demarcated by the promulgation dated May 12, 1959 made by Sir Evelyn Baring under Kenya colony protectorate which extended up to and including Mackinnon Road town. In 1961 arbitrary decision was made by then District Commissioner Mr



Af Holford Walker to transfer the administration of Mackinnon Road Township to Kwale adversely affecting residents giving birth to historical injustice. The 1st interested party averred that the Taita people were aware of their boundaries historical background and customs. The 1st Governor of the County of Taita Taveta set up a boundary committee to collate views and advise on the status of the boundary disputes both internal as well as with neighbouring counties. Subsequently the said Committee prepared a report to that effect. The 1st interested party made reference to the report of the National Land Commission dated July 23, 2024 at paragraph 95(i). The 1st Interested Party stated that this court should order Parliament to set up a commission in order to determine and order the boundary of Taita Taveta county be reverted to Taru and including Mackinnon road town as it was before world war II.

28. The 1st interested party further laid claims over Mtito Andei township as forming part of Taita Taveta. It was its contention that the historical boundary of the people of Taita of Taita Taveta and Akamba of Makueni even before demarcation and land adjudication commences at Tanzania border through Tsavo west national park past Mzima springs along Mtito river crossing Nairobi – Mombasa highway at Mtito Andei river. The 1st interested party stated that due to unresolved intercounty boundary disputes the county government of Makueni and Kwale had been illegally levying taxes on residents of Mtito Andei and Mackinnon Road Town. Thus, the 1st interested party prayed for: -
- a. A declaration that the provision of sections 2, 5 and 16 of the Second Schedule to the District and Provinces Act was void and unconstitutional for violating the historical marked boundaries of the Counties of Taita Taveta, Makueni and Kwale.
 - b. A declaration that the people of Taita Taveta had a right to observe and maintain their traditional shrines which forms part of their cultural heritage
 - c. A declaration that the current boundary delimitation violated the constitution and cultural rights of the people of Taita Taveta
 - d. An order compelling Parliament to finalize the delimitation of the Counties of Taita Taveta and Kwale by reverting Mackinnon road town to Taita Taveta.
 - e. An order compelling Parliament to demarcate the boundaries of the Counties of Taita Taveta and Makueni at Mtito Andei by restoring a territory measuring 52, 509 Acres to Taita Taveta county
 - f. A declaration that the County government of Kwale and Makueni were liable to compensate the County government of Taita Taveta for all levies, license fees, property tax ad any money illegally collected from territory of Taita Taveta
 - g. A declaration that County governments of Kwale and Makueni were liable to refund to all traders in Mackinnon and Mtito Andei for any monies illegally collected from them
 - h. Costs of the suit.
29. The 1st interested party also filed a replying affidavit sworn by Habib Mruttu, the Acting County secretary. The replying affidavit was said to be sworn in support of the petition. The acting County Secretary set out historical land injustices meted on the people of Taita Taveta and boundary disputes between Taita Taveta, Kwale at Mackinnon Road Town as well as the Counties of Makueni and Taita Taveta at Mtito Andei. The deponent on advise of their advocates stated that the grievances raised satisfied the criteria for historical land injustices provided under the provision of section 15(2) of the National Land Commission Act for four reasons provided at paragraph 4 of the replying affidavit.



Most of the contents of the replying affidavit was as provided for in response to the petition and the cross petition which this court has succinctly summarized as above.

30. The replying affidavit consisted ofannextures annexed thereto being; the Order in Council of June 27, 1921 which vested the Governor powers to proclaim boundaries, proclamation order dated May 12, 1959, a copy of a letter dated April 1, 1961 from Kwale District Commissioner to Taita Taveta District Commissioner, a report of the boundary committee set up in 2015, the gazette notice 3139 of February 20, 2014 on taskforce relating to formulation of legislation on investigation and adjudication of complains arising out of historical injustices, copies of letters dated March 17, 1961 and April 1, 1961 which were correspondences between District Commissioner Taita District and Kwale District, a copy of a letter dated May 17, 1961 which the District Commissioner Kwale wrote to the District Commissioner Taita, a copy of a letter dated May 31, 1961 by District Commissioner Taita, copies of letters dated August 9, 1961, August 11, 1961 and August 12, 1961 which were correspondences between Hon D Mwanyumba, the then Coast Provincial Commissioner, the then District Commissioner Taita and back to Coast Provincial Commissioner, a copy of a letter dated September 26, 1961 from Coast Provincial Commissioner to secretary trust land board requesting for reversal of transfer of Mackinnon road to Kwale and revert to Taita, a copy of a letter dated June 30, 1962 from Coast Provincial Commissioner to the Chief Commissioner, a copy of a letter dated August 11, 1962 by Hon D Mwanyumba to District Commissioner Taita and copied to counterpart at Kwale, correspondences that chief at Mackinnon and Taru who administered these areas was paid from Taita and leave approvals sought from Taita, copies of national identity cards for residents of Mackinnon road town stated to be issued by Taita, a program of an event to receive the first President of Kenya Mzee Jomo Kenyatta on December 22, 1973, correspondences on government programs and intelligence gathering, correspondence for grant of approval of a school, applications, connection list and bills issued by Taveto Water, a copy of Certificate of registration and Certificate of Title for Mbela primary school, licenses issued by Taita Taveta, an affidavit sworn on February 12, 2024 by James Mtua Chao.
31. The acting County Secretary stated that in the year 2012 the County of Taita Taveta filed a Miscellaneous application No 34 (JR) of 2012 – 05 - 28 against the Independent Electoral and Boundaries Commission (Hereinafter referred to as “The IEBC”) and the Attorney general in the high court at Mombasa. According to him, the case sought for the restoration of 156,166 acres of prime land which as per the Independent Electoral and Boundaries Commission proposals were hived off from the County of Taita Taveta. The 1st Interested party attacked the Districts and Provinces Act of 1992 for codifying the historical injustices by Taita people. He averred that it was enacted in oblivion of the struggle of the Taita people to regain sovereignty of the lost territories. Parliament should have paid regard to express resolution by the then District Commissioner Kwale and Taita and the Coast Provincial Commissioner to revert back Mackinnon town to Taita Taveta. He stated that the National Land Commission visited and found that Taita Taveta had established many social amenities and continued to provide services. The 1st Interested Party stated that there was evidence that people were unjustly moved and that was how Shauri Moyo a slum/informal settlement at Mtito Andei largely inhabited by Taita people was created. Again, the Taita people were moved in Mackinnon Road Town and settled at Mile Kubwa and reserved. He averred that although the National Land Commission heard this evidence during their site visit but they ignored it. During the said site visit, the National land commission heard evidence that there was a traditional beacon and a community public ground at Taru town. The two counties recorded a consent confirming that the initial boundary of Taita people was at Taru, Landi ya Mwembenyi which was recorded in the hansard. The 1st interested party stated that this court should analyze and evaluate the evidence and come to its own independent conclusions. The



court should also form its own opinion. The 1st Interested Party urged the court to construe existing laws and bring into conformity with the constitution

VIII. The 2nd Interested Party's Case.

32. On record is letter dated August 22, 2024 from VA Nyamodi and Company Advocates addressed to the Deputy Registrar of this court. The said letter stated that the 2nd respondent serves as a notice that the 2nd respondent hereby withdrew a 27 paragraphed replying affidavit sworn by the County Solicitor, Kisiwa Mohammed Koja on August 12, 2024 filed and served on August 19, 2024 and recalled service of the same forthwith. The replying affidavit contained annexures being; a copy of the gazette notice no 1397 dated February 1, 2013; a copy of the Kwale County integrated development plan for 2018 – 2022; a copy of the report of auditor general for Kinango constituency National Government Constituency Development fund dated July 23, 2021 and a copy of the report by the National Land Commission dated July 23, 2024.
33. In the replying affidavits, the deponent averred that the petition was riddle with falsehoods and mis - representation concerning Mackinnon Road Town and the alleged double taxation or violation of the property rights of traders of Mackinnon Road town resulting from the 1st and 2nd interested parties. It stated that Mackinnon Road Town had been within jurisdiction of 2nd interested party since before Kenya attained independence. That after Kenya attained independence the boundary of Kwale District (as it was then) was clearly described in part 2 of the Second Schedule of the District and Provinces Act of 1992 as commencing at the north western corner of the town and the District's and county boundary was drawn in accordance with the description. The Independent Electoral and Boundaries Commission had delaminated constituencies and wards as per the provision of article 188(4)(c) and set up for constituencies and 7 electoral wards. I must state that the word delaminate appears to be used in the wrong context by the 2nd interested party.
34. The official map issued by Ministry of Lands and Physical Planning published in the Kenya gazette notice number 1397 dated February 1, 2013 was clear that Mackinnon Road fell within the County of Kwale. Reference was also made to 2nd interested party's integrated development plan making provision of Mackinnon town. Emphasis was also placed to the National Government Constituency Development Fund as being used to render services to the residents for Kinango Constituency. The 2nd interested party stated that boundaries it used was as per the report by National Land Commission dated July 23, 2024 under the Districts and Provinces Act. The 2nd interested party posited that as well as its predecessor adhered to these boundaries in administration of the county and levies taxes within the said boundaries ensuring it never encroached on boundaries of the 1st Interested Party and there were no complaints submitted by residents of Mackinnon Road Town about alleged double taxation and harassments. The 2nd interested party stated that the petitioner had failed to provide evidence of alleged double taxation and historical dispute with regards to location of Mackinnon Road.

IX. The 3rd Interested Party's Case.

35. The 3rd interested party filed a replying affidavit sworn by Thomas Thuta on October 11, 2021 in response to both the application and the petition. Mr Thuta was the Sub - County Administrator of Kibwezi East Sub County, County of Makueni administering Mtito Andei, Ivingoni/ Nzambani Thage and Masongaleni wards. The 3rd interested party stated that there was an existing boundary dispute between the Counties of Makueni and Taita Taveta at Mtito Andei.
36. The 1st interested party held that the petitioner mislead the honourable court by stating that the 1st interested party's predecessor was issuing permits and levying taxes in Mtito Andei prior to the



establishment of county governments in the year 2013. The deponent averred that Mtito Andei was administered by town council of Mtito Andei established in the year 1988. Residents of Mtito Andei received business permits and paid revenue to town council of Mtito Andei and not predecessor of the 1st interested party. Some of the things said to be done by town council of Mtito Andei included the issuance of Letters of Allotment, development of strategic plans to improve service delivery, development of budgets running various departments, carrying out various projects, giving quarterly budget monetary reports on income and expenditure, entering into performance contracts to ensure that council is well managed, delivering services to Mtito Andei, prepare and submitting audited annual financial statements.

37. According to the deponent, when the colonialists originally did the boundaries of districts and provinces, they set up seven beacons that defined boundaries of the districts of Machakos, Kajiado and Taita which had not changed to date. Prior to independence, a delegation from Taita District presented petition to the colonial government proposing the alteration of the traditional boundary to deviate from Tsavo river at its intersection with Nairobi Mombasa main reserve.
38. The 3rd interested party made reference to the districts and provinces act which provided boundaries for Taita Taveta district and Makueni District. The deponent posited that the petitioner had not tendered evidence of alleged double taxation. On June 1, 2020 the County executive Member for Finance and Economic planning for the County of Taita Taveta, member of county assembly of Taita Taveta county assembly representing Ngolya Ward some sub county administrators from Taita Taveta held a meeting at Mtito Andei town where they invited members of the press and public were present. They made a declaration that from July 2020 Taita Taveta would start collecting revenue from Mtito Andei and its environs and would be setting administration and revenue offices in Mtito Andei. The aforementioned was said to have triggered the Hon Member of Mtito Andei ward to table the issue of boundary dispute between the County Assembly of Makueni and Taita Taveta for discussion. Subsequently, upon holding the deliberation, the County Assembly came up with report dated April 20, 2021.

X. Submissions by Parties.

39. On May 28, 2024, while in the presence of all parties the honourable court granted directions on having the main Petition be disposed off by way of written submissions. Unfortunately, by the time of penning down this Judgement, despite an intensive perusal of the physical court file and the Case Tracking System (CTS), the honourable court was only able to access the written submissions by the 2nd, 3rd respondents, the 1st, 2nd & 4th interested parties. For one reason or the other, the honourable court never obtained any submissions from the petitioner, the 1st respondent and the 3rd interested party. Indeed, the learned counsel Sharon Mutua for the 1st respondent indicated they would not be filing submissions. She further informed court that there was an order from the Court of Appeal granting the status quo ante setting aside the conservatory orders granted by this court.
40. At this juncture, Mr Mwangi for the 1st interested party orally prayed to be allowed to file cross - petition. He was of the view that the main petition had not adequately addressed some fundamental and substantive matters pertaining to the indepth social, anthropological and historical perspective of the subject matter and which the honourable court ought to be informed in order for it to arrive at a fair and reasonable determination it's final determination of the matter. Instantly, this application was vehemently opposed and the court made its determination on the spot. Both the learned counsels Mr Salim for the 2nd interested party and Mr Mutua for the 3rd interested party virgorously opposed and argues that that request was being made at the time when the matter was at its conclusion and should move the court formally. Mr Mutua contended that the 1st interested party could not frame issues outside the main petition. He referred court to the case of "*Republic v Philomena Mbete Mwilu*



– EACC No 38 of 2016” . Secondly, he averred that the proceedings in terms of evidence had been concluded and order of this court authorizing the National Land Commission to take over proceedings to deal with one of the issue of investigation of historical injustice which was being raised by the 1st interested party. In actual fact, the NLC had deliberated at length on it and made its their findings. He insisted that apart from the 1st interested party all the other parties had filed their submissions and it would be prejudicial to re - open the case. Besides, he underscored that the 1st interested party had not filed replies for more than twelve months. The issue of boundaries and double taxation had become emotive and the need to expeditiously determine the matter and the judgement date had been vacated severally.

41. Likewise, the learned counsel, mr. penda while opposing the application for filing a cross petition indicated that the 1st interested party joined the proceedings late and though they had proper “locus standi” needed time to file their submissions and agreed with the petitioner that no prejudice will be suffered by any party.
42. Upon consideration, the court directed that
 - a. The petitioner be granted seven days to file replies to replying affidavit by the 1st interested party and 3 days to file and serve skeleton submissions
 - b. 1st interested party granted 14 days to file written submissions
 - c. There be no highlighting of submissions and the judgement date of October 16, 2024 be shifted to November 19, 2024 to allow court time to go through the documents
43. The 1st interested party be at liberty to formally move the court seeking any appropriate relief. in a nutshell, the honourable court rejected that application by the 1st interested party to file a cross petition at this time.
44. Be that as it may, based on the filed submissions, it proceeded to reserve November 19, 2024 as the date to deliver the Judgement on its own merit.

A. The Written Submissions by the 2nd, 3rd & 4th Respondents & the 4th Interested Party.

45. The 2nd, 3rd & 4th respondents and the 4th interested party through the offices of the Honourable Attorney General, State Office Mombasa filed their written submissions dated September 10, 2024. Mr Penda PM Advocate, a Senior Litigation state counsel commenced his submissions by briefly noting that the court in its determination of the notice of preliminary objection it had filed dated October 19, 2021 gave directions that the matter be referred to the National Land Commission to hear out the existence of historical land injustices as well as make recommendations on the boundaries of the three counties. The National Land Commission finally made its determination and filed its report.
 - a. The Learned counsel identified three (3) issues for determination. These were:-
 - i. Whether the National Executive failed to survey and erect visible beacons between counties as per District and Provinces Act 1992?
 - ii. Whether the petitioner established that the residents of Mtito Andei were paying double taxation?
 - iii. Whether the national executive was responsible for altering and delimiting county boundaries hence whether the prayers in the petition can be granted?



46. On these issues, the learned counsel submitted that the National Land Commission at paragraph 4.0 of its report contradicted the claim that there were no beacons between the two disputing counties on either side. The report stated that the boundaries were well defined and beacons present on the ground as required under the Districts and Provinces Act 1992. The report was prepared after survey and ground visit by seven member committee of experts who were all certified Land Surveyors and the methodology was clearly outlined under paragraph 2.0.
47. To buttress his point, the learned counsel relied in the case of *“Evans Nyakwana v Cleophas Bwana Ongaro 2015 eKLR*. The counsel averred that that the allegations made by the petitioner that residents of the two towns were subjected to double taxation had not been proven. Although the Petition was supported by affidavits, none of the deponents had attached county revenue documentation receipts and invoices showing payments. To him, the petitioner had not met the standard of proof required as stated by the court of appeal in the case of: *“Palace Investment Limited v Geoffrey Kariuki Mwenda & another 2015 eKLR”*.
48. The learned counsel placed reliance on the provision of article 188 of the Constitution to dispel the notion that the national executive has failed to demarcate boundaries between counties. He referred court to its own ruling delivered on March 23, 2022 at paragraphs 75 – 78 . In conclusion, the learned counsel prayed that the honourable court adopted its reasoning and findings in the said ruling.

B. The Written Submissions by the 1st Interested Party.

49. The 1st interested party through the Law firm of Messrs Manasses, Mwangi & Associates – MMAS Advocates Company Advocates filed their written submissions dated October 12, 2024. Mr Mwangi and Mr, Kipngetich Advocates commenced their submissions by providing a brief background of the matter herein. They stated that the petition dated July 19, 2021 was for determination by this honourable court. In support of the petition, the 1st interested party filed a response to the petition dated September 18, 2024, replying affidavits sworn by Habib Mruttu, Peter Mwanyunbu Polokoi , Josephine Wakesho Nerbart, Wilsom Mwangombe among others.
50. In these submissions, the 1st interested party addressed the following issues:
- a. Whether a boundary dispute exists between the County of Taita Taveta and Kwale at MacKinnon Road Town and Taita Taveta and Makueni at Mtito Andei.
 - b. What orders should the court issue.
 - c. Costs.
51. Pursuant to the court’s orders, (NLC) visited the various sites of the disputes at Mtito Andei and Mackinnon Town. The NLC was directed by the court to investigate whether there were cases or instances of historical land injustices and the issue of inter-county boundary disputes. Historical land injustice was one occasioned by an act of colonizer or an existing legislation. In these submissions, we shall note the various acts of injustice that was occasioned to the people of Taita Taveta County.

At this juncture, it was necessary for the learned counsels to bring out what the case of Taita people is. The people of Taita had their land and territory clearly marked border to border by way of traditional/ customary beacons known as fighis. Fighis was a site of rituals where elders would conduct significant ceremonies to inter alia pray God for rains, cleanse the community and even speak blessings. The fighis would be symbolized by a race or trees. The fighis marked internal (inter sub-tribes’ boundaries) as well as the external boundaries. The relevant fighis to this exercise was two, one at Mtito River near its intersection with the new and the old Mombasa roads. The other external fighis was at a place called



Taru near Taru hills (mlima wa Taru). There is also another external fighis at Kilimbosi Hill (mlima wa kilimbosi).

52. The boundaries of the territory of the Taita people was marked by natural geographical features like mountains, hills, rivers and man-made features like Roads and railways. After the Tsavo National Park was gazetted in the year 1948, the territory of the Taita people was abridged to the extent that the Tsavo National Park land was excised from the territory of the Taita people. The new boundary was marked and delineated by the Kenya Uganda railway line.
53. As a fact there were several Taita people who served in the completion of the Kenya Uganda railway line at the section where the railway line passed through the territory of Taita people. Degwa Rijani testified before the commission on behalf of Taita Taveta County that his father was constructing the Kenya Uganda railway line and he continued working for the railway line. He further stated that he was born in the year 1937 in the railway line quarters and he also worked there. He clearly stated that the people of Kwale would hand over the carrier of the colonial governor at the landi ya mwembenyi near the fighi at Taru. The Taita people would hand over the governor to the Kamba people of Machakos at the crossing of Mtito river. This piece of testimony was uncontroverted before the NLC.
54. It was the case of the Taita people that the boundary of Taita county and Makueni county was marked by the Mtito river from chyulu up to the intersection of the said river with the old Kenya Uganda railway line and then moved along the railway line (meter gauge rail) up to the intersection with Tsavo river and then moves easterly along the Tsavo River under the intersection with sabaki river.

At the site visit conducted by NLC on June 21, 2024, it was manifest that the boundary according to the District and Provinces Act 1992 never followed any of the natural features and even the man-made feature like the rivers and the railway line. The boundary cut off the town and segregates the Mtito Andei town from other facilities like the state lodge, the gate to Tsavo West National Park and the Anglican church. It is our submission that the District and Provinces Act 1992 codified historical injustices. The boundary should be aligned to follow the political or statutory boundary with the customary and well-known historical boundaries of the Taita people. The town of Mtito Andei was established for the Taita people as there was no town from Voi and Wundanyi. This town would also serve the staff and tourist who visited Tsavo West National Park at Mtito Andei gate. Further the town served the staffs and facility of the state lodge.

55. In the affidavit of Mtua cited above, he analysed the various ambiguities and inconsistencies that mark this boundary at the Mtito Andei town unique and different from the description of other boundaries under the District and Provinces Act 1992.

The learned counsels averred that there were several matters that arose in this petition. The petition concerned a boundary issue that then underpinned the authority of either county to levy fees, tax or other charges in the disputed territories. As such, there was a preliminary question as to who had the jurisdiction over real issue. Was it the National Land Commission? Was it an institution under Parliament? Was it an institution under the Inter-governmental Relations Act? Was it the Independent Electoral and boundaries Commission? This petition queried the historical injustices that had been codified under an Act of parliament. It was only this court that could declare certain provisions of the law to be unjust or inconsistent with the constitution. Notably, the institutions envisaged to be created by parliament and Intergovernmental Relations Act had not been established.

56. There second preliminary issue, was whether the interested part(ies) may raise substantial questions beyond what is raised in the petition. This being a public interest petition, any person may agitate the petition. Indeed, even if the petitioner decided to cease the pursuit of this petition, this court would have the jurisdiction to strike out the petitioner and join a new petitioner. The learned counsels urged



this court to proceed unhindered by procedural technicalities to determine the real dispute between the parties and make the appropriate reliefs. If the court felt doubtful in granting the reliefs sought or determining the real issues between the parties, just because of the status of the interested part(ies), I pray that the 1st interested party be transposed as a petitioner and the court proceeds to deal with the real issues unhindered by the procedural technicality of the posturing of the parties to the dispute.

57. Mackinnon Town

The learned counsels averred that the current boundary dispute at Mackinnon Road stems from an arbitrary decision made in 1961 by the then Taita District Commissioner Mr Af Holford Walker to transfer the administration of Mackinnon Road Township to Kwale District. In a letter dated April 1, 1961, the Kwale District Commissioner informed the Taita District commissioner that there were a large number of Africans both Taita and Duruma cultivating in the Township area by irrigation from the pipeline overflow. The concerns of the DCs was how many Taitas were going to be moved to Kwale.

58. The decision to transfer the administration of Mackinnon Road from Taita to Kwale was codified and published vide Legal Notice No 207 published in the Special Issue of the Kenya Gazette Supplement No 34 of May 12, 1959.

After much agitation and resistance to the transfer of Mackinnon Road to Kwale, the decision was reversed. All these correspondences corroborate the 1st interested party's averment that the administration of Mackinnon Road reverted to Taita. It was important to note that the NLC constantly stated that the claim of the Taita People, the 1st interested party, was not anchored on any legal document. In other words, the claims by the other two counties were justiciable because, there were documents that document their claim. This assertion ignored legal documents such as Legal Notice No 207 published in the Special Issue of the Kenya Gazette Supplement No 34 of May 12, 1959. It also ignored various legal documents including correspondences by the District Commissioners of Taita Taveta District and the Kwale Districts. Most importantly, this assertion was made in oblivion of the Coast Province Annual report that recorded the decision to transfer the administration and collection of taxes and government fees back to Taita district from Kwale District.

The counsels submitted that Taveta water company -Tavevo Water, supplies water to the people of MacKinnon Road Town up to date. This fact was confirmed by NLC during the site visit.

At Mackinnon town the NLC was shown what was now a chief's camp. Initially, it was a land set aside for livestock development office and a cattle dip to service the adjacent Taita Ranch. Taita ranch is land of the Taita people and it is still the territory of Taita Taveta under the 1992 Act.

59. The representatives of Kwale county showed an old building to the NLC officials which was branded Kwale water offices. The offices had been branded in February, about three months from the day of the visit. The offices were not in operational, contrary to earlier evidence, that Kwale county provides water services to the people of MacKinnon town. On the other hand, the NLC visited the offices of Tavevo Water that was operational. Residents on the ground also confirmed that they receive their water supply from Tavevo water and sewerage company. This is corroborated by the endurance of water connection and billing provided by Taita Taveta county.

The learned counsels submitted that there was ample evidence on record, that MacKinnon Town had been a territorial and administrative Unit of Taita Taveta county. The Taita Taveta County had been levying business licenses. The chiefs in MacKinnon town including Kasigau and Miasenyi would collect their Uniforms from Wundanyi the headquarters of Taita Taveta. Education in Mbele Primary School and Miasenyi was also administered from Voi Divisional Educational offices. Water was managed, supplied and charged by TAVEVO Water & Sewerage Company, a water company of Taita Taveta County. It was only recently that the Kwale county has re-encroached MacKinnon Township.



Through force and brute, Kwale county has been wresting land, revenues and business levies from the Taita Taveta County. A vivid illustration is when the NLC made a site visit in June, 2024, it found that Kwale county had painted an old building and branded it Kwale water in readiness to coerce and coax the people of Mackinnon town into paying water connection and water levies to Kwale County. The only hindrance thus far is lack of a water license. When there is this clear evidence, what legal document would be necessary to show that the Taita Taveta People were in possession and administration of this township?

60. The NLC opined that the Taita People stake their claim on physical occupation. That was partly true. It was further the case of the Taita people that, when the boundaries were being codified into, the legislature, the survey of Kenya and the other concerned stakeholder, should have taken into account, the physical occupation of the respective communities. As the adage goes, Unjust Laws are not good laws. To the extent that District and Provinces Act, 1992 codified an injustice, it was legislated in total disregard of the important circumstances on the ground, including, physical occupation of the people, traditional and historical boundaries, shared heritage, natural and man made land features among others, this legislation ought to be revisited.
61. The commissioners visited the grave site of the first assistant chief Mr S Mwatate who served as a chief clerk of the colonial chief near MacKinnon town. The historical and continued boundary of Kwale county and Taita Taveta county is marked by the three main geographical features. The hill of Kilimbasi, the hills of Taru and Galana river. This boundary represented as reproduction service for case of reference. Along the boundary there was the fighi at the boundary near landi ya Mwembenyi.

At the site hearing the parties of Kwale County and Taita Taveta recorded a consent as follows: -

- d. The “fighi” traditional cultural and historical boundary exists at Taru. The Anglican Church Taru, Taru secondary school and Taru open public grounds (landi ya Mwembeni) actually exist as tabulated in the evidence of Taita Taveta county. The above cited boundary and the landmarks of Kilimbosi hill and the two hills of Taru were clearly visible by the commission when standing at the four beacons marked “Beacon A” “Beacon B” “Beacon B4” and “Beacon B5”. Taita Taveta county actually provided to the commission the three hills while standing at “Beacon B4” and “Beacon B5”.

The learned counsels averred that there was ample evidence that the people of Taita Taveta occupied the land as set out above in the blue line. It was again the case of the County of Taita Taveta that the land of the Taita people was taken away from the Taita People. The magic acquisition has taken after the 1st world war when the British took over from the Germans. The land was converted into a military base and the Taita people taken to a concentration village. Even after independence, the Taita people did not get back their land. The government of independence Kenya converted the land to be partly government land under the Government Land Act, cap 280 (now repealed).

62. It was the submission of Taita Taveta county that the people of Taita were disadvantaged of some point in history and part of their territory was taken away. At this point, the Counsels set out the instances and incidences that ushered in or paved way for the impugned historical injustice.

The 1st world war was bitterly fought in Taveta by the British and the Germans on the opposite sides. When the Germans lost the war and upon creation of the league of nations, the lands and the military bases at the Germany soldiers was taken over by the British army. It was therefore controlled by the British. Upon independence, the Taita community never got back their land, part of the land was declared government land and the locals were taken to concentration camps called “Maili kubwa” (This loosely translates as Miles far away) and “Reserves”, another informal settlement. At Mtito Andei, the



Taita people were unjustly Moved to pave way for building of schools, The Anglican Church and a dispensary. The people settled in the informal settlement that is the modern day “Shauri Moyo”

The then DC of Wundanyi of the colonial period directed the DC kinango to administer Mackinnon town. This single act of the colonial DC leaders flared up tension and the Taita people protested (see evidence at page ...0 while the DC was intently to transfer the affairs of administration of the Mackinnon town. The DC could not have had anything to independently alter the boundaries of the districts and the provinces. The coast provinces commissioner directed the town of Mackinnon to be reverted to Taita people. This decision was never acted upon and this mistake was later codified vide the District and Provinces Act 1992. While kwale county tried to justify that its people were the historical owners, the person talking on behalf of Kwale county Mr Mwatele stated that the Duruma people came later to Mackinnon area. He admits that the Duruma people of Kwale are not the original inhabitants of this land. They were not even affected by the historical injustice of the 1st and 2nd World Wars.

63. The fact that a community in Kenya was not politically powerful or politically proactive should not be a reason to disadvantage them or dispossess such a community its land or territory. Indeed, that is why the law is there to protect everyone.

Today Kwale county had taken several steps, same with emotive consequences, to attempt to sanctify the impugned action of taking of the land area in territory of the Taita people.

- a). Attempting to issue title deed for Mackinnon town. (there has been chaos and protest and the process of issuance of title deeds has not been halted)
- b). Making various government statements on public grounds around Mackinnon Road.
- c). Attempting to put offices for supply of water.
- d). Forcefully collecting license fees from the traders
- e). Refusing to obey court orders.

The learned counsels argued that the above demonstrated a clear boundary dispute between the two counties of Taita Taveta and Kwale.

64. Historical injustices at Mackinnon Road Town

The learned counsels submitted that there was no dispute that Mackinnon Road Town was a territory of the people of Taita and it was a part of Taita District before the year 1961. In the year 1961, the District Commissioner, Taita wrote to the Coast provincial Commissioner expressing his desire that the administration be transferred and placed under he charge of the District Commissioner of Kwale District The letter read thus:

“I shall be grateful if consideration is given to the inclusion of Mackinnon Road Township within Kwale District.”

65. According to the counsels this request for transfer of Administration was a personal decision of the Taita District Commissioner. None of the residents had expressed their desire to be included in Kwale District and they were never involved in the decision-making process. Indeed, the people of Taita and the leadership of the Taita People vehemently opposed this decision. In pursuit of his nefarious scheme to forcibly transfer and displace the inhabitants of Mackinnon Road, the District commissioner went



as far as suggesting that water supply would be disconnected at Mackinnon Road. In his letter dated April 25, 1961, he wrote:

“Mackinnon Road Town is only desirable to the Taita whilst there is water there. Immediately this water is shut off they will have to move in any case.”.

Upon learning of the intended transfer of Mackinnon Road Town to Kwale, all the inhabitants of Mackinnon opposed the move. By a letter dated April 20, 1961, the District Assistant, Voi Division addressed the DC Taita District as follows:-

“I think we are going to have great opposition to this transfer. I held a preliminary baraza at Mackinnon Road on Tuesday 18th April, which was attended by all the inhabitants.

They expressed the view that they have no intention of going under Kwale District, that in 1890 they had been told that if they wished to remain in Taita they should move their homesteads, this they have done.”

66. The above cited letter demonstrates that the people of Mackinnon Road were against the transfer of their Town to Kwale District. The decision was shoved down the throats of resisting residents. After a lot of resistance from the residents of Mackinnon Road Township and political leadership, the move to transfer Mackinnon Road to Kwale was reversed. In a letter dated August 18, 1961 (page 66) the District Commissioner, Taita wrote thus:-

“I am quite ready to reverse my previous recommendation over Mackinnon Road Town, in view of the violent political opposition to the move”.

The District Commissioner went on to confirm that the decision to reverse the transfer of Mackinnon Road to Kwale had been reversed. At paragraph 4 of his letter, the District Commissioner wrote that:-

“I apologise for having quite unwittingly stirred up a regular hornet’s nest and would suggest I inform Mr. Mwanyumba that after consultation with you, in view of the strong feelings of the Taita and the possibility of a large scale ranching scheme in the area, consideration will be given to reversing the transfer, which has, incidentally already been granted.

In the above letter, the District Commissioner confirmed that the reversal of the transfer had already been granted. In a letter dated June 19, 1962, the Taita District Commissioner confirmed that the transfer of Mackinnon Road to Kwale District was reversed and wrote that:

“The only point on the district boundary which has been subject to dispute is Mackinnon Road. This area was recently transferred to Kwale for a short period, but after much agitation by the Taita it was restored to this District in 1961 to our general satisfaction.”

On June 30, 1962, the Coast Provincial Commissioner wrote to the Chief Commissioner. The letter was in relation to the alteration of District and Local Boundaries. Paragraph 2(a) of the letter confirms that Mackinnon Road had been transferred back to Taita District and goes on to state that the Secretary of the Trust Land Board in his letter dated December 2, 1962 confirmed that it will be included in the next proclamation amending the provincial and district boundaries.

The correspondence referred above confirms that Mackinnon Road Town was restored to Taita District. The only thing that was to be done was gazettment. Thenceforth, Mackinnon Town was administered by the District Commissioner of Taita District. The witnesses illustrated this fact clearly citing instances such as: -



- i. The administration of Mackinnon Road Town and Kasigau location was carried out from Voi under Voi Division. Mr Stephen Mwarashu who was former Chief of Kasigau Location testified that he had an assistant chief from Mackinnon Road, Mr S Mwatate. Stephen Mwarashu further testified that his jurisdiction extended up to Mackinnon Road Town and he listed some of the activities he coordinated at Mackinnon such as distribution of relief food, collection of tax and population census.
- ii. The People of Mackinnon Road applied for national identification documents from Taita Taveta.
- iii. Permits to hold political rallies at Mackinnon Road were obtained permits from Voi.
 - a. Mackinnon Road Town is supplied water by Tavevo Water which belongs to Taita Taveta. This was admitted by the Kwale witness.
 - b. Trade premises and occupation licenses at Mackinnon Road Town were issued by the County Council of Taita Taveta.
- ii. During the hearing, the witness for Kwale while answering a question from Commissioner Reginald Okumu confirmed that based on the documents filed Mackinnon Road Town at some point in history was in Taita Taveta. His only contention was that county governments were established in 2013 and Mackinnon Road was being administered from Kwale. This was an admission.
- iii. When Wilson Mwangombe testified, he informed the Commission that he carried out the historical investigation together with one Laban Tole whose statement is found at pages 177 to 184. Laban Tole's affidavit is also found at pages 1-5 of the Supplementary Index of documents dated February 15, 2024.
- iv. Page 176 contains an official entry permit to the archives search room issued to Laban Tole Mwakireti. This confirms the authenticity of the documents and correspondence which are public documents relied on by Taita Taveta.

67. Boundary Dispute at Mtito Andei

The learned counsels submitted that it was common ground and witnesses' testimony from both Taita Taveta and Makueni confirmed that there was a boundary dispute at Mtito Andei. Specifically, Paragraph 6 of the Affidavit of Rael Muthoka confirmed the existence of the dispute:-

“The land problem between the two counties germinated back in 1992 with the passing of the Districts and Provinces Act No 5 of 1992 which contains an ambiguous delimitation of Machakos and Taita Districts, wherein an overlap is contained over Mtito Andei Town.”

The Districts and Provinces Act No 5 of 1992 defines the boundaries of both Machakos and Taita Districts as “including Mtito Andei”.

68. Both James Mtua Chao and Peter M. Ndonge (The surveyors) agreed that there were traditional boundaries which were marked by natural features such as lakes, rivers, hills, mountains, rocks among others as well as manmade features such as roads, railways, social grounds, shrines and even churches. Further, the Counsels held that it was common ground that there was a longstanding dispute regarding the location of Mtito Andei. Both Makueni and Taita Taveta lays claim for the town. A Report of the



County Assembly of Makueni addresses whether the county of Makueni was aware of the ensuing boundary dispute with Taita Taveta County. The report states:

“The ECM indicated that the department was aware of the matter, further indicating that the matter had been there even before the inception of the 2010 constitution, which gave birth to the counties.”

Eventually, the County Assembly of Makueni made recommendations to resolve the current boundary dispute. Specifically, recommendation number (iii) states:

“Parliament in line with article 188 of the Constitution of Kenya, 2010 urgently sets up an independent commission to inquire into the current stalemate between Makueni and Taita Taveta Counties and recommends remedial measures.”

This recommendation was one of the prayers being sought by the Petitioner.

69. The issue of double-taxation

The learned counsel referred court to the affidavit of Josephine Wakesho which confirmed the existence of this dispute. Wilson Mwang'ombe testified that the residents of Taita Taveta were being forced to pay taxes and levies to Taita Taveta and Kwale at Mackinnon Road and Taita Taveta and Makueni at Mtito Andei.

Paschall Kyulle confirmed that he knows people at Mtito Andei who paid business permit license fees to Taita Taveta and they were later forced by Makueni to pay a similar fee. In Kyulle's words, the traders were given a choice to pay the amount twice or be taken to court. This they had to pay. The colonial redrawing of boundaries between communities resulted in historical land injustices to the people of Taita Taveta. Consequently, the current county boundaries germinate from the colonial disturbance of boundaries which has resulted in counties competing for revenue in a single administrative area. The result is unfair imposition of taxes through double-taxation.

70. In conclusion, the 1st interested party urged this Honourable court to find that:-

- a. A boundary dispute between Taita Taveta and Kwale Counties existed at Mackinnon Road Township.
- b. A boundary dispute between Taita Taveta and Makueni Counties existed at Mtito Andei Township.
- c. The historical injustice transferring Mackinnon Road to Kwale was codified by the District and Provinces Act 1992. This was despite the fact that the transfer was reversed.

Upon finding the existence of the inter-county boundary dispute, the court should issue an order directing parliament to set up an independent commission pursuant to article 188 of the Constitution of Kenya to resolve and alter the boundaries of the three counties.

The dispute that underlies this petition had been long standing. It is a unique dispute where historical injustices were codified into law. Such a law that codifies a historical injustice, cannot stand in light of article 165 of the constitution. They prayed that this honourable court to march past the hindrances and barriers posed by rules of procedure and or procedural edicts that require creation of special institution that had not been created and frame an appropriate relief that determined the instance dispute effectively.

71. Considering the historical background that has been laid down herein on the historical location and administration of the two towns, it was necessary to alter the boundaries at Mtito Andei and



Mackinnon Road Township. This was in line with article 188(2)(c) of the Constitution of Kenya 2010 which provide that the boundaries of a county may be altered to take into account the historical and cultural ties. Admittedly, the boundaries of the two counties of Taita Taveta and Makueni at Mito Andei were ambiguous. There is an overlap. The Taita people were unjustly moved. In Mackinnon town they were moved to villages and informal settlements that are the modern day “Maili Kubwa village” and “Reserve”, a village. In Mito Andei, The Taita people were moved to what is currently, “Shauri Moyo” informal settlement. The 1992 Act ignored the pre-existing traditional boundaries of the Taita People, established through what the NLC called physical Occupation. Currently, the Kwale county was undertaking an illegal sub-division and titling of Land at Mackinnon through a settlement scheme method. This process brings people from outside the Mackinnon town, they are handed over title deeds to lands that are already occupied by Taita people. The Schools built by the Taita people were being titled and registered in Kwale county. This was another phase of historical injustice that is fomenting and must be nibbed at the bud before it turns bloody. At the site hearing, the officials of Kwale county admitted that they are now progressing to the second phase of the settlement scheme.

72. In the end, the petition was merited and the prayers sought should be granted. Considering the nature of this dispute, under article 23 of the *Constitution of Kenya, 2010*, this court has the jurisdiction to issue any other appropriate reliefs including declarations.

C. The Written Submissions by the 2nd Interested Party.

73. Through the Law firm of Messrs VA Nyamodi and company Advocates, the 2nd interested party filed written submissions dated September 20, 2024. Mr Nyamodi Advocate commenced his submissions by providing court with a brief background of the matter at hand herein. The 2nd interested party identified a single issue for determination; whether the petitioner had proved violation of any constitutional rights and freedoms in light of the findings and recommendations of the National Land Commission joint survey report dated July 23, 2024. To begin with, the 2nd Interested Party placed reliance on the provision of section 107 of the Evidence Act, cap 80 and the case of “*Anarita Karimi Njeru* (1979) eKLR”.
74. The learned counsel extensively made reference to the ruling of this court delivered on March 23, 2022 and the report dated July 23, 2024 emanating from a joint survey and the findings by the National Land Commission. To the 2nd interested party, Mackinnon Road town had been within jurisdiction of the County of Kwale before Kenya attained independence as provided in the report which was to the effect that the current demarcation of county boundaries was conducted pursuant to the repealed District and Provinces Act No 5 of 1992 which formed the basis of dividing Kenya into forty seven counties to include the County of Kwale pursuant to provision of article 6(1) of the Constitution as per the First Schedule. According to the learned counsel, the boundary of the County of Kwale, previously Kwale District begun at North western corner of Mackinnon Road Town which formed the basis of Mackinnon Road Town to be within jurisdiction of the County of Kwale pursuant to Part 2 of the Second Schedule of the repealed Districts and Provinces Act 1992 which provided for boundaries of the Kwale District as commencing at the North western corner of Mackinnon Road Town; thence south- eastern by the north eastern boundary of that town to its north eastern corner.
75. To the 2nd interested party, Mackinnon Road Town was therefore within Kwale. Further, the Gazette Notice No 1397 dated February 1, 2013 appearing on 2nd respondent’s replying affidavit sworn by Kisiwa Mohammed Koja on August 21, 2024 as annexure and marked as “KMK – 1” was a map from the Ministry of Lands and Physical Planning declaring that Mackinnon Road Town fell under jurisdiction of the County of Kwale.



76. The honourable court takes note of the fact that “Delaminate” (Sic) was a word which had been extensively and loosely used by the 2nd interested party from the contents of Paragraph 20 of its submissions. To the 2nd interested party exclusive mandate was given to the IEBC to delaminate constituencies and wards pursuant to article 88(4) of the Constitution. The IEBC owing to its constitutional and statutory mandate has set up 4 constituencies being Msambweni, Matuga, Kinango and Lunga Lunga which were within jurisdiction of the County of Kwale. The IEBC was said to have further proceeded to delaminate (sic) seven electoral wards within Kinango Constituency being Kinango, Mackinnon Road, Mwavumbo, Kesemeni, Puma, Samburu and Ndavya.
77. The 2nd interested party submitted that the petitioner and the County of Taita Taveta could not be heard to say that the description of the boundaries of the Counties of Kwale and Taita Taveta as delineated in the District and Provinces Act, 1992 was ambiguous as the surveyors interpreted the said description without any ambiguity as per parts 4 and 6 of the joint survey report submitted to the NLC.
78. Moreover, the IEBC in pursuance of its mandate under the provision of article 188(4)(c) of the Constitution delimited seven electoral wards within Kinango constituency in the County of Kwale including Mackinnon Road Town ward which was confirmed during site visit conducted on June 22, 2024. The County of Kwale demonstrated that two primary schools in Mackinnon Road Town namely Jafey, CAFGEM and Mwanatibu primary schools served as polling station of the constituency of Kinango. The County of Kwale was submitted to have managed Mackinnon Road Town and entire Mackinnon Road Ward and also providing services such as garbage collection, supply of water, administrative services including funding of community based organizations. The 2nd interested party had listed services and projects it had initiated in Mackinnon Road Town. The County of Kwale was said to have demonstrated that it supported education system in Mackinnon Road Town and headteacher CAFGEM confirmed that he reported to the County Director of Education of the County of Kwale. Three institutions were said to be supported by the county government of Kwale and also business community confirms that taxes were paid and obtained from the County of Kwale. The national security administration and coordination of Mackinnon road was said to be under the Officer Commanding Station Mackinnon Police station who reports to the Officer Commanding Police Division Samburu and who was under the administration of Kwale Police Administration unit. Reference was made to part 3.2.2 of the survey report submitted to the NLC.
79. Reference was further made to Kwale County integrated development plan 2018 – 2022 said to have made provision for Mackinnon Road Town as administrative and political unit with elaborate strategic plans for its development as such Mackinnon Road Town was within jurisdiction of the County of Kwale. The 2nd interested party in its second split submitted on ambiguity of boundaries. To the 2nd interested party there was no conflict of the boundaries between the Counties of Taita Taveta and Kwale as joint survey team of surveyors unanimously reviewed and interpreted the District and Provinces Act No 5 of 1992 and found that descriptions correspond well with the actual ground. The team also unanimously confirmed the beacons and natural resources that are in place marked the true position of the boundary. Reference was made to paragraph 4.1 of the report. It was submitted that the survey disapproved the Petitioner’s allegations concerning the availability of disputes between communities residing along the boundary line. Reference was made to Paragraph of page 22 of the report which proved that Mackinnon Road Town was not disputed area as it was cosmopolitan comprising of different communities as per paragraph of the report page 22. The 2nd interested party averred that the report debunks the allegations that the national government had failed to erect visible beacons to clearly demarcate the boundary between the Counties of Taita Taveta and Kwale, reference was made to paragraph b page 21 of the report.



80. The learned counsel asserted that the petitioners allegations of historical dispute with regards to the location of Mackinnon Road town were unfounded as there is no evidence to prove that the location was gazetted in 1947 to be part of Taita Taveta county until being transferred to the County of Kwale by the then District Commissioner of Taita Taveta District A. F. Holford Walker. This court was being urged to rely on paragraph n at page 22 of the report. It was submitted that there was no iota of evidence that the then District Commissioner wrote to the Coast Provincial Commissioner requesting location of Mackinnon Road Town to be transferred to Kwale district for administrative challenges.
81. In respect of double taxation, the learned counsel placed reliance at paragraph 95 g of the report. It was his contention that the allegations by the petitioner of double taxation on residents of Mackinnon Road Town were unfounded, baseless and misrepresented. In conclusion, his submission was that the petitioner failed to prove their case and not entitled to reliefs sought and dismiss the petition with costs.

XI. Issues for Determination.

82. As a matter of facts, and as indicated before, on May 28, 2024 Sharon Mutua, Advocate for the 1st respondent informally informed court that there was an order from the Court of Appeal granting the status quo ante setting aside conservatory orders granted by the court. This information would have been extremely useful in guiding this court towards drawing its final decision in the fullness of time and the run. Ideally, I must hasten to state that no order from the Court of Appeal is on record or has been supplied to the court.
83. Nonetheless, the court has given due consideration to the weighty issues, keenly perused the petition, the responses and written submissions ad the myriad of authorities cited filed by parties herein. Further, I have directed my mind to the relevant provisions of the Constitution, statutes and principles thereto.
84. In order to reach an informed, reasonable and just decision in the subject matter, the honourable court distils the following seven (7) salient issues for its determination in the instant petition. These are:-
- a. Whether this honourable court has jurisdiction to determine county boundaries between the Counties of Taita Taveta and Makueni at Mtito Andei; and between the Counties of Taita Taveta and Kwale at Mackinnon Road Town?
 - b. Whether the constitution petition dated July 19, 2021 meets the threshold of such a Petition.
 - c. What are the boundaries for the Counties of Taita Taveta and Makueni at Mtito Andei ; what are the boundaries for the Counties of Taita Taveta and Kwale at Mackinnon Road Town?
 - d. Whether the cross - petition by the 1st interested party/cross petitioner dated September 18, 2024 is competent/ has any merit?
 - e. Whether the honourable court can entertain the dissatisfaction of the 1st interested party against the report of the National Land Commission dated July 23, 2024 on historical injustices in the instant petition?
 - f. What are the appropriate reliefs, if any that the honourable court can grant in the circumstances?
 - g. Who will bear the costs of the constitution petition dated July 19, 2021.



XII. The Law and analysis.

Whether this honourable Court has jurisdiction to determine county boundaries between Taita Taveta County and Makueni County at Mtito Andei; and between Taita Taveta County and Kwale County at Mackinnon Road Town?

85. Before I make any step, the issue of jurisdiction first comes into the mind of this court. The issue of jurisdiction has substantially been dealt with by superior courts in the Republic. In court of Appeal in “the *Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd*[1989] eKLR” Justice Nyarangi rendered himself on the question of jurisdiction of a Court of law.

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

86. On the source of a court’s jurisdiction, the Supreme Court of Kenya in the case of:- “*Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* (2012) eKLR” stated as follows:-

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law”.

87. The jurisdiction of the of the Environment and Land Court is provided for by the provision of article 162(2) and (3) of the *Constitution of Kenya* and sections 3 & 13(2) of the *ELC Act* No 19 of 2011; section 1010 of the *Land Registration Act*, No 3 of 2012 & Section 150 of the Land Act, No 6 of 2012.

88. The provision of article 162(2)(b) which states that Environment and Land Court has the mandate to hear and determine disputes relating to use and occupation and title to land. In particular it provide as follows: -

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a); and
 - (b) the environment and the use and occupation of, and title to, land.



- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)

89. 13. Jurisdiction of the court

- (1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of the Constitution.
- (4) In addition to the matters referred to in subsections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.
- (5) In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including—
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (f) restitution;
 - (g) declaration; or
 - (h) costs.

90. In its ruling of March 23, 2022, this court rendered itself extensively on the question of jurisdiction. Therefore, I am satisfied that this court is vested with jurisdiction to hear and determine the boundary disputes herein. In the aforementioned ruling, this court comprehensively dealt with the issue of jurisdiction. At this juncture the court does not need to dwell on the same save to reproduce thus;



91. In view of my analysis and findings as enumerated above, this court declares to assume jurisdiction of the instant petition in the first instance. The upshot of all these and for avoidance of any doubts, I did hereby order as follows: -
- a. That this honourable court has original and unlimited Jurisdiction under the provisions of article 162(2)(b) of the Constitution, sections 3 & 13 of the Environment & Land Court Act No 19 of 2011, sections 101 of the Land Registration Act, No 3 of the 2012 and section 150 of the Land Act, No 6 of the 2012 to hear and determine the issues raised herein this Petition and hence to that extent the preliminary objection raised by the respondents and the interested parties is disallowed for being unmeritorious.
 - b. That for the sake of attempting to resolve the existing boundaries dispute facing the three Counties of Taita Taveta, Makueni and Kwale, under the circumstances where there exists no clear legal mechanisms to do so, the instant proceedings are stayed for a period of Six (6) months from the date of this ruling;
 - c. That in the meantime, the petitioner be and is hereby directed to immediately serve this orders upon the National Land Commission lodge a formal complaint with the National Land Commission to enable them initiate investigations into the historical injustices and the instant county boundary dispute involving these three Counties prepare a detailed report with practical and pragmatic recommendations on the appropriate redress to resolve the said County boundary dispute once and for all.
 - d. That in the petitioner be and is hereby directed to immediately within the next seven (7) days from the date of this ruling extract and serve this orders upon the National Land Commission for their action thereof.
 - e. That upon service the Chairman and the Secretary to the National Land Commission be and are hereby directed to file a comprehensive report on the said three County Boundaries before this honourable court on its recommendations and appropriate redress within the next seven (7) days after its preparation for its adoption by court and further direction;
 - f. That in the meanwhile, there be interim orders appointing and/or authorizing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mackinnon Road Town just as its predecessor did before the establishment of county governments in 2013, and to deposit all the revenues it so collects into an interest earning bank account opened jointly with the County Government of Kwale for a period of six (6) months from the date of this ruling.
 - g. That interim order appointing the County Government of Taita Taveta to be the sole authority issuing business permits and levying county taxes in Mtito Andei town just as its predecessor did before the establishment of county governments in 2013 and to deposit all the revenues it so collects into an interests earning bank account opened jointly with the County Government of Makueni.
 - h. That this matter to be mentioned on October 10, 2021 for purposes of compliance by the National Land Commission, ascertainment of the progress and taking further directions with regard to the disposal of the Main petition hereof.
 - i. That this being a matter of great public interest and still at the very initial stages there is no orders as to costs.



Issue No. b). Whether the Constitutional Petition dated July 19, 2021 meets the laid down threshold.

92. Under this sub - heading, for the court to respond to this query, assessing certain aspects of the concept of constitutional provision are inevitable. To begin with, under the provision of articles 2(1) & (4) of Constitution of Kenya defines the Constitution as being the Supreme law of the Republic and it bids all persons and all States at all levels. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in in contravention of this Constitution is invalid.
93. Additionally, I dare say that a Constitution is a living tissue. Just like all other tissues, it has to be fed and watered. It breathes without oxygen and freshness it will die. I have learnt that these things are not just metaphorical. They are real. As a matter of course, the Constitution of Kenya under article 259(1) provides a guide on how it should be interpreted as such: -
- a. Promotes its purposes, values and principles;
 - b. Advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - c. Permits the development of the law; and
 - d. Contributes to good governance.....”
94. This court must give a liberal interpretation and consideration to any provision of the Constitution and have regard to the language and wording of the Constitution and where there is no ambiguity attempt to depart from the straight texts of the Constitution must be avoided. It must always be interpreted and considered as a whole with all the provisions sustaining and coordinating each other and not destroying the other.
95. Based on the principles set out in the edit of the Court of Appeal case of the “Mumo Matemu v Trusted Society of Human Rights Alliance & another (2013) eKLR” provided the standards of proof in the constitutional petitions as founded in the case of “Anarita Karimi Njeru v Republic [1980] eKLR 154” where the court is satisfied that the petitioner’s claim was well pleaded and articulated with absolute particularity. It held: -
- “Constitutional violations must be pleaded with a reasonable degree of precision.....”
- Further, in the “Thorp v Holdsworth (1886) 3 Ch D 637 at 639, Jesse, MR said in the year 1876 and which hold true today:
- “The whole object of pleadings is to bring the parties to an issue and the meaning of the rule.....was to prevent the issue being enlarged which would prevent either party from knowing when the cause came on for trial what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues and thereby diminish expense and delay especially as regards the amount of testimony required on either side at the hearing.”
96. Article 23(3) of the Constitution empowers a court to grant appropriate reliefs in any proceedings brought under article 22 where there has been violation or threat of a violation of a fundamental right or freedom. The relief may include a conservatory order.
97. By and large, therefore its this court’s full satisfaction and holding that the filed instant petition herein meets the basic threshold of constitutional petition as spelt out herein above.



Issue No. c). What are the boundaries for Taita Taveta County and Makueni County at Mtito Andei ; what are the boundaries for Taita Taveta County and Kwale county at Mackinnon Road Town?

98. Under this sub heading the honourable court will endeavour to critically deal with and examine aspects of boundaries delimitation and delineation of Counties and Constituencies. Its instructive to note that since the promulgation of the Constitution there have been multiple disputes between various counties on boundaries. In the instant petition, this court has been called to rise up to the occasion to determine and resolve boundary disputes between the Counties of Taita Taveta and Makueni over boundary dispute relating to Mtito Andei and the County of Taita Taveta and Kwale county over Mackinnon Road Town. The provision of article 6(1) of the Constitution states that the territory of Kenya is divided into the counties specified in the First Schedule. The first schedule lists counties in the Republic being:-

1. Mombasa
2. Kwale
3. Kilifi
4. Tana River
5. Lamu
6. Taita/Taveta
7. Garissa
8. Wajir
9. Mandera
10. Marsabit
11. Isiolo
12. Meru
13. Tharaka-Nithi
14. Embu
15. Kitui
16. Machakos
17. Makueni
18. Nyandarua
19. Nyeri
20. Kirinyaga
21. Murang'a
22. Kiambu
23. Turkana



24. West Pokot
 25. Samburu
 26. Trans Nzoia
 27. Uasin Gishu
 28. Elgeyo/Marakwet
 29. Nandi
 30. Baringo
 31. Laikipia
 32. Nakuru
 33. Narok
 34. Kajiado
 35. Kericho
 36. Bomet
 37. Kakamega
 38. Vihiga
 39. Bungoma
 40. Busia
 41. Siaya
 42. Kisumu
 43. Homa Bay
 44. Migori
 45. Kisii
 46. Nyamira
 47. Nairobi City
99. The petitioners case is that he received a letter dated July 12, 2021 from 178 residents of the County of Taita Taveta to intervene and find a solution to boundary disputes which have been simmering for a long time since pre independence period between Taita Taveta and Makueni over location of Mtito Andei and between the Counties of Taita Taveta and Kwale over location of Mackinnon Road Town. The petitioner states that this boundary disputes are used by counties to compete for administration and resources leading to double taxation violating the petitioners propriety rights as enshrined under the provision of article 40(1) of the Constitution and as such the two – fold questions which arise are - which county should collect taxes at Mtito Andei; and which county should levy and collect taxes at Mackinnon road town.



100. The Constitution of Kenya neither has provisions setting out the boundaries of the counties nor does it make reference to any other law. To arrive at what the exact boundaries of the three counties then this court has to look at the relevant laws and texts. The Constitution should be given a purposive interpretation where all provisions are read as a whole with each provision sustaining the other. The provision of article 259 of the Constitution mandates this court to construe and interpret the Constitution in a manner that—
- (a) promotes its purposes, values and principles;
 - (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
 - (c) permits the development of the law; and
 - (d) contributes to good governance.
101. In saying so, the honorable court wishes to cite the case of “*The Council of County Governors v Attorney General & another* [2017] eKLR the court stated that under article 259 of the constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under article 159(2)(e) of the [constitution](#) to protect and promote the purposes and principles of the constitution.
102. In the case of “*Tinyefunza v Attorney General of Uganda*, Constitutional Petition No 1 of 1997 { 1997}, UGCC 3, the court stated that the constitution should be given a purposive, liberal interpretation and that the provisions of the Constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other. In [State versus Acheson](#) {1991} 20 SA 805, the principle emanating is that it is important to bear in mind that the spirit of the constitution must, preside and permeate the process of judicial interpretation and judicial discretion. Constitutional questions must be determined in formidable terms guided by some constitutional principles that transcend the case at hand and which are applicable to all comparable cases. Court decisions cannot be had hoc but must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant case. A constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation. Also See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. It is important to give full recognition and effect to the fundamental rights and freedoms, see the privy council in the case of “*Minister for Home Affairs and Another – Versus - Fischer* {1979} 3 All ER 21. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to the fundamental rights and freedoms.
103. The Committee of Experts on Constitutional Review in its report noted:-
- (i) Levels of devolved government
- In accordance with the majority’s preferences, the levels of government in the RHDC were reduced to two: national and county. This responded to concerns about the role of regional government and



the cost of administration. For the units of county governments, the Districts enacted in 1992 by The District and Provinces Act were adopted as proposed

counties. The regional units in the Harmonized Draft Constitution had been conceived to be large units better posed to apply checks and balances to the exercise of power at the national level. Without the regional level, it was necessary to establish units of devolved government in the RHDC that could be effective for this purpose, while at the same time, with capacity to provide services close to the people. This, and the fact that they were lawfully recognized administrative units, explains the adoption of the 1992 Districts.

The RHDC provided for a review of boundaries by a specialized commission. The object of including the units of devolution in this Draft was to provide a starting point for a new dispensation of devolved units. But the boundaries of the devolved units could then be altered in accordance with the procedure provided. It is to be noted that, whereas electoral boundaries would be reviewed and could change periodically, those for the counties as units of devolution would not change regularly.

104. This honourable court will be guided by the above principles as it resolves the issues in the petition. The provision of section 27 of the 1963 Independence Constitution provided in subsections (1) and (2) as follows:-

- “ 27 Kenya shall be divided into 40 districts and the Nairobi area; and each District
(1) and the Nairobi area shall elect one Senator in such manner as, subject to the provisions of this Constitution, may be prescribed by or under any law.
(2) The boundaries of the Nairobi area shall be those that are specified in Part II of schedule I of this Constitution and, subject to the provisions of section 227 of this Constitution, the districts shall be those that are specified in part III of that schedule and that have the respective boundaries that are there specified.”

105. The *Districts and Provinces Act*, 1992 was assented into on June 22, 1992 and came into operation on June 26, 1992 and provided for divisions of Districts and Provinces. The preamble of which provides as follows:-

An Act of Parliament to prescribe the districts and provinces into which Kenya is divided.”

Section 2 provided that Kenya is divided into the Nairobi Area, the boundaries of which are set out in the First Schedule, and the several districts the respective boundaries of which are set out in the Second Schedule.

106. In the case of “*John N Michuki & another v Attorney-General & 2 others* [2002]eKLR the court stated:-

“The thrust of the applicant’s case is that, going by the constitutional provisions which have never been amended, there are only 40 districts in Kenya. To that extent therefore, in purporting to create any more districts, the *Districts and Provinces Act*, 1992 is ultra vires the Constitution. Having overstepped the Constitution, the said Act is in itself null and void.

This is not the first time the applicant has questioned the creation of new districts outside the provisions of the *Constitution*. He has had occasion to raise this in parliament and we deem it necessary to set out the relevant extract of the Parliamentary Debates of July 4, 2001. The following is what transpired:

“ creation of district s



Mr Michuki: Mr Speaker, Sir, I beg to ask the Attorney- General the following Question by private Notice.

- (a) Is the Minister aware that in contravention of section 123(1) of the Constitution of Kenya, the Government has created districts in various parts of the country?
- (b) Does the Districts and Provinces Act (Act No 5 of 1992), prescribe all the districts as required by the Constitution?

The Attorney-General (Mr Wako): Mr Speaker, Sir, I beg to reply.

- (a) The Attorney General is aware that some districts have not been prescribed by an Act of Parliament.
- (b) The Districts and Provinces Act No 5 of 1992, does not prescribe all the districts.”

There then followed interventions and contributions on the oath of office to uphold the Constitution of Kenya as by law established and questions as to why the same has been flouted since 1992. The Hon. Attorney General is reported to have confirmed that the Constitution of Kenya will not be deliberately violated. The debate then continued thus:

“Mr Wamae: Mr Speaker, Sir, you must have heard the Attorney-General admit that 28 districts have been created illegally and contrary to the Constitution and the Government has continued employing District Officers, Officers Commanding Police Divisions (OCPDs) and other district officers contrary to the law.

What is the Attorney-General going to do to have this matter rectified, and has he not been negligent in not advising the government that the creation of these extra districts was an illegality and unconstitutional?

Mr Wako: Mr Speaker, Sir, as I stated in my Answer, I acted and advised the Government correctly and in time. That is why they immediately embarked on this exercise which you will agree that the progress made is quite fast. This is because if the boundaries of 28 districts have already been finalized and 12 more are about to be finalized and only six or eight have some boundaries which are about to be settled, you will agree that the government is proceeding very fast on the advise of the Attorney General.

Mr Michuki: Mr Speaker, Sir, could the Attorney General tell this House, the country and the world too, because it is listening whether it was in order for which ever authority, whether it was the president of the Republic of Kenya or the Attorney General himself, to create districts before the law had been passed to establish those districts, through what must be a commission to establish the wishes of the people whether they should be divided into two districts? Could the Attorney-General explain this matter because it is highly unconstitutional and it is against the oath of office, and the government ought to resign because of that?

Mr Wako: Mr Speaker, sir, I believe that the announcement of the intention to create new districts was made in good faith and in response to the needs and requirements of the people of these areas.”



The applicant through counsel agrees that the creation of additional districts was in good faith but that the Constitution should have been respected and upheld. To safeguard any future breaches thereof, the declarations sought should be made to ensure that the law is upheld.

We have given the issues raised considerable thought. We agree that the Independence Constitution set out the number of districts and that the 1968 amendment saved that provision. We also agree that an Act of Parliament cannot amend the constitution which requires 65% or more members of the Assembly so to do.

With profound respect therefore, section 5 of the District and Province Act that purported to amend/repeal section 4 of the Constitution of Kenya (Amendment) Act, 1968 is null and void. We must express our surprise at how such a provision could sail through the glaring eyes of the Hon members including the presenter.

Be that as it may, we are not in agreement with the applicant and the Attorney General that the creation of the additional districts under the 1992 Act was necessarily illegal. The said Act as we have observed hereinabove, was unconstitutional to the extent of its provision purporting to amend the Constitution, but not so in the creation of the disputed districts.

We say so because whereas section 4 of the 1968 amendment repealed the provisions relating to the number and boundaries of districts as set out in the Independence Constitution, the said provisions were to continue in force as if they had been re-enacted as part of the said Act “ except as may, be otherwise provided by or under an Act of Parliament”

The Districts and Provinces Act, 1992 came into operation on June 26, 1992 and provided for divisions of Districts and Provinces. This cannot be said to be *ultra vires* the Constitution because, it is the Constitution itself which in the year 1968, conferred the said powers upon an Act of Parliament, of which the 1992 Act is one, to otherwise provide. We are not concerned about the administrative formalities here but in our respectful view, the creation thereof was lawful and within the ambit of the said Act. Having so found, any breaches founded thereon cannot be sustained and any declarations related thereto cannot be issued.

107. In the case of: “*Republic v Interim Independent Boundaries Review Commission & 9 others; County Government of Mandera & another (interested parties); ex - parte Minister of State for Planning National Development and Vision 2030 & another* [2016] eKLR the court stated:-

“Under the *Districts and Provinces Act*, 1992, Kenya was divided into Nairobi Area and 46 administrative districts under the national government. By April 2010, the number of districts had been increased to a total of 267 through Executive fiat.

108. Despite other Districts being created, Kenya had 47 Districts the above authority is clear. The *Districts and Provinces Act* provided for a total of 47 Districts as follows,

Nairobi Area.

- 1, Mombasa
2. Kwale



3. Kilifi
4. Tana River
5. Lamu
6. Taita
7. Garissa
8. Wajir
9. Mandera
10. Marsabit
11. Isiolo
12. Meru
13. Tharaka-Nithi
14. Embu
15. Kitui
16. Machakos
17. Makueni
18. Nyandarua
19. Nyeri
20. Kirinyaga
21. Murang'a
22. Kiambu
23. Turkana
24. West Pokot
25. Samburu
26. Trans Nzoia
27. Uasin Gishu
28. Elgeyo/Marakwet
29. Nandi
30. Baringo
31. Laikipia
32. Nakuru
33. Narok



34. Kajiado
35. Kericho
36. Bomet
37. Kakamega
38. Vihiga
39. Bungoma
40. Busia
41. Siaya
42. Kisumu
43. Homa Bay
44. Migori
45. Kisii
46. Nyamira

109. The boundaries of the disputed areas in the instant petition are as follows:-

2. The Kwale District.

Commencing at the north-western corner of Mackinnon Road Town; thence south-easterly by the north-eastern boundary of that town to its north-eastern corner; thence north-easterly by a straight line for approximately 13.8 kilometres (8¼ miles) to a point having UTM grid reference EG 098056 due west of a cairn at the source of the Manjewa (Ngutu) River; thence by a straight line due east to that cairn; thence generally southerly and downstream by the course of that river to its confluence with the Mang'ombe (Maji ya Chumvi) River; thence downstream by the course of that river to its intersection with the generally southern boundary of the railway reserve of the Nairobi-Mombasa main railway line; thence generally south-easterly by that railway reserve boundary, and excluding all stations and other railway reserves, to the north-eastern corner of LRNo 4526; thence by the eastern boundary of L.R.No.4526 to the north-east corner of Sub - division No 909, Section VI, Mombasa Mainland North; thence southerly by part of the eastern boundary of that sub - division to the north-west corner of Subdivision No 224 of the same section; thence by the eastern boundary of Sub - division No 224 to its south-east corner on the high water mark of the northern branch of Mwachi Creek; thence by the centre channel of that branch and the centre channel of the water of Mwachi Creek to the waters of Port Reitz; thence by a line southerly across the waters of Port Reitz to the waters of Bombo Creek; thence in a generally southerly direction by the centre channel of the waters of Bombo Creek and by the centre channel of the Majera River to a point west of the mouth of that river; thence in a generally easterly direction along the high water mark of Bombo Creek to the northern boundary of the main road from Mtongwe to Bombo Creek; thence generally north-easterly by that road reserve boundary to a beacon 4 at the south-east corner of LR No 3855/112; thence generally northerly and north-easterly by the generally eastern boundary of LR No 3855/112 to a beacon at the most southerly corner of LR No 3855/111; thence continuing generally northerly, easterly, southerly and again easterly by the generally southerly boundary of that portion to its intersection with the generally



western boundary of LR No 3855/75; thence south-westerly by part of that boundary to the north-west corner of Likoni Commonage; thence generally south-easterly and easterly, by the generally south-western and the southern boundaries of that commonage to its south-east corner; thence generally southerly by part of the generally western boundary of LR No 3855/6 and the generally western boundary of LR No 3855/14 to the most northerly corner of LR No 3855/15; thence south-easterly by the north-eastern boundary of LR No 3855/15 to its most easterly corner, and continuing by the north-eastern boundary of that portion extended to its intersection with the high water mark of the Indian Ocean; thence by a straight line due east to the limit of the territorial waters in the Indian Ocean; thence generally south-westerly by that limit to its intersection with the Kenya- Tanzania international boundary; thence generally north-westerly by that international boundary to its intersection with the extension of the straight line between the summits of Kilibasi Hill and Kavuma Hill; thence by that extended straight line east-north-easterly to the summit of Kavuma Hill and continuing by that straight line to the summit of Kilibasi Hill; thence north-easterly by a straight line to the south-eastern corner of Mackinnon Road Town; thence north-westerly and north-easterly by the south-western and north-western boundaries of that town to the point of commencement.

6. The Taita District.

Commencing at a beacon MR on the Kenya- Tanzania international boundary; thence easterly on a true bearing of $86^{\circ} 02'$ for a distance of 36,637 feet to the trigonometrical beacon Njugini; thence southerly by part of the eastern boundary of original LR No 9378 to its intersection with the Njugini River; thence easterly and south-easterly downstream by that river to its confluence with the Ollaioni (Tsavo) River; thence north-easterly and downstream by that river to its intersection with a line on a true bearing of $180^{\circ} 00' 23'$ and at a distance of 120 feet from a beacon MSE; thence northerly by that line on the same true bearing to beacon MSE; thence on the same true bearing for a distance of 32,009 feet through trigonometrical beacon Mid to a beacon t.23; thence on the same true bearing for a distance of approximately 300 feet to its intersection with the Rombo (or Ngare Len) River; thence easterly and downstream by that river to its intersection with a line on true bearing of $187^{\circ} 02'$ and at a distance of 760 feet from the trigonometrical beacon Rocks; thence by that line to that beacon and continuing on the same true bearing of $07^{\circ} 02'$ for 69,760 feet passing through Magoine Camp to beacon Lava; thence on a true bearing of $53^{\circ} 46'$ for a distance of 10,555 feet to trigonometrical station Chamwie; thence on a true bearing of $11^{\circ} 34'$ for a distance of 35,445 feet to trigonometrical beacon Ridge; thence generally south-easterly by the generally north-western boundary of the western section of the Tsavo National Park to the trigonometrical point Chyulu 2; thence generally north-easterly, southerly and easterly by that park boundary, including Mtito Andei, to its intersection with the western boundary of the Nairobi-Mombasa main road reserve; thence south-easterly by that road reserve boundary to its intersection with the Tsavo River; thence generally easterly and downstream by that river to its confluence with the Galana (Sabaki) River; thence continuing generally easterly and downstream by that river to a point of its northern bank having UTM grid reference EG 243608; thence south-westerly by a straight line to the north-eastern corner of Mackinnon Road Town; thence north-westerly, south-westerly and south-easterly by the north-eastern, north-western and south-western boundaries of that town to its south-eastern corner; thence south-westerly by a straight line to the summit of Kilibasi Hill; thence west-south-westerly by a straight line to Kavuma Hill and continuing that line to its intersection with the Kenya- Tanzania international boundary; thence north-westerly, north-easterly and northerly by that international boundary to the point of commencement.



17. The Makueni District.

Commencing at the intersection of western boundary of Nairobi-Mombasa main railway line reserve with Mukaa Location boundary; thence generally north-easterly by that location boundary and continuing generally northerly, easterly, southerly and north-easterly by the northern boundary of Kalama, Tulumani, Kiteta, Kisau and Kibauni Location boundaries to its intersection with the Athi River (Sabaki or Galana) River; thence generally south-easterly and downstream by that river to its confluence with the Tsavo River; thence generally westerly and up-stream by that river to the intersection of the western boundary of the Nairobi-Mombasa main road reserve; thence generally north-westerly by that road reserve boundary to its intersection with the generally northern boundary of the western section of the Tsavo National Park; thence westerly and northerly, including Mtito Andei, and generally south-westerly by the north-western boundary of that park to trigonometrical point Chyulu 2; thence generally north-westerly by that park boundary to trigonometrical beacon Ridge; thence generally northerly and north-westerly by a series of lines joining the summits of the Chyulu (Ngulia) Range for a distance of approximately 19 kilometres (12 miles) to trigonometrical beacon Chyulu 1; thence north-westerly by part of the straight line joining trigonometrical beacons Chyulu 1 and Emali 4 kilometres (2½ miles) south of Sultan Hamud to its intersection with the Kiboko River; thence generally north-easterly by that river to its intersection with the south-western boundary of the Nairobi-Mombasa main railway line reserve, south-east of Kiboko Station; thence generally north-westerly by that railway reserve boundary including the former trading centres on that line to the point of commencement.

110. From the foregoing, it is not in doubt that the County boundaries in place under the 2010 Constitution is based on the [Districts and Provinces Act](#) of 1992. The petitioner seeks a mandatory order compelling the National Executive to within twelve months from the date of the order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 counties as per the [Districts and Provinces Act](#) 1992 with preference being given to the boundaries between the Counties of Taita Taveta and Makueni on the one hand and the Counties of Taita Taveta county and Kwale on the other. It is clear that even the petitioner is fully aware that the basis of the current county boundaries has its foundation under the Districts and Provinces Act.

111. Whereas the instant case is completely different as it relates to county boundaries and not just any other land boundary it is important that I make reference to the case of "*George Kamau Macharia & Dexka Limited* (2019) eKLR", Kemei J stated as follows:-

“From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry index map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this court was to hear and determine this matter it will still require the input of the Land Registrar. The framers of section 18(2) of the Land Registration Act placed this matter before the land registrar who has the technical advice and resources of the district surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of government, it is important for the court to let that department proceed to meet its legal obligations. In this case the office of the land registrar is mandated to deal with the general boundary dispute first before the same is escalated to the court. It is the view of this court that the dispute is prematurely before the court”.



The report by the National Land Commission.

112. I reiterate that in its ruling delivered on March 23, 2021 the court directed that for the sake of attempting to resolve the existing boundary disputes facing the three counties the proceedings are stayed for six months. The court directed the petitioner to serve the orders to the NLC to initiate investigations into the historical injustices and instant county boundary disputes and prepare detailed report with practical and pragmatic recommendations on appropriate redress for its adoption and further directions.
113. From the records, when the matter proceeded to the NLC the 3rd interested party filed notice of preliminary objection dated March 17, 2023 while the 2nd interested party filed notice of preliminary objection dated March 20, 2023 challenging the jurisdiction of the National Land Commission. The 2nd Interested party went further to challenge that the Petitioner's complaint does not meet the requirement of regulation 7(2) of the [*National Land Commission \(Investigation of Historical Land Injustices\) Regulations* 2017](#).
114. The NLC dismissed both objections on October 5, 2023 and directed that the matter would proceed to investigation and hearing. The 3rd interested party being aggrieved filed memorandum of appeal dated October 30, 2023 in 'Mombasa Environment and land Court Appeal No 36 of 2023; *Makueni County Government v National Land Commission & 6 others* which I will not delve into later on.
115. The NLC through its historical and injustice committee began its hearings on February 23, 2023 and prepared report dated July 23, 2024. The petitioner appeared in person while Parliament and the interested parties were represented by their respective advocates. Parties also called witnesses. The NLC framed two issues for determination; whether the claim qualifies as historical land injustice claim in accordance with the provision of section 15 of the NLC Act. On these issues the Commission returned a negative verdict. The second issue was the applicable law as to county boundaries and whether there is any ambiguity on the three interested parties county boundaries. The Commission placed that the basis of county boundaries is the [*Districts and Provinces Act* 1992](#).
116. A joint team of surveyors confirmed the location of all beacons and natural features that mark the boundary between counties of Makueni and Taita Taveta as well as boundary between Taita Taveta and Kwale. The joint team of surveyors unanimously reviewed and interpreted the act with regards to contentions sections of the inter county boundaries making reference to features described in the Act specifically second schedule under Makueni, Taita Taveta and Kwale. The report states that there is no ambiguity as to the current boundaries as it is. The NLC made fourteen (14) finding and conclusions. And further it made six (6) recommendations.
117. I have keenly perused the joint survey report by the Survey team lead by Sosphter Ohanya, Samuel Gatuku, Joseph Malonza, Eunice Njambi, Joseph Waithaka, Peter Mwanja Ndonye and Tsuma Mkala who are head of Survey National Land Commission, Principal Surveyor National Land Commission, Senior Surveyor National Land Commission, Assistant Surveyor National Land Commission, Surveyor Taita Taveta County, County Surveyor Makueni and Director Survey Kwale Respectively. I have analyzed the survey report, objectives, scope, Datum, methodology and conclusion.
118. I wish to state that the provision of article 67 provides:- for the establishment of the National Land Commission and its functions:
 - (a) to manage public land on behalf of the National and County Governments;
 - (b) to recommend a national land policy to the National Government;



- (c) to advise the National Government on a comprehensive programme for the registration of title in land throughout Kenya;
 - (d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;
 - (e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;
 - (f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;
 - (g) to assess tax on land and premiums on immovable property in any area designated by law; and
 - (h) to monitor and have oversight responsibilities over land use planning throughout the country.
- (3) The National Land Commission may perform any other functions prescribed by National legislation which is the National Land Commission Act No 5 of 2012.

119. While spelling out the legal mandate of the NLC, the Supreme Court in Advisory Opinion Reference 2 of 2014 “*National Land Commission v Attorney General & 5 others; Kituo Cha Sheria & another (Amicus Curiae)* (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 (KLR) stated:-

“(313) In the course of rendering this Advisory Opinion, we have considered the mandates of the NLC as set out in the Constitution [article 67(2)(d), (e) and (f)]. These are: conducting research on land issues and on natural resources—with appropriate recommendations to certain agencies; initiating inquiries into historical land grievances—and recommending courses of redress; promoting traditional methods of resolving land conflict.

(314) From those provisions, it is clear to us that the NLC bears a brains-trust mandate in relation to land grievances, with functions that are in nature consultative, advisory, and safeguard-oriented. As regards such functions, the NLC, on the basis of clearly-formulated statutes, should be able to design a clearly-structured agenda for regular operations and inter alia, should seek to devise a well-focussed safeguard-mandate in relation to land issues.

120. Coming back to issue in question, whereas I am not bound by the NLC report dated July 23, 2024 I must admit that the report is utterly persuasive. I say so, particularly taking that the honourable court never got an opportunity to have conducted a site visit itself as provided for under order 18 rule 11 and/or order 40 rule 10 of the *Civil Procedure Rules*, 2010. Evidently, the report offers a plethora and extensive knowledge of the issues in question. The report also reflects a brain – thrust mandate vested on the Commission and provides practical recommendation. It is detailed with robust and pragmatic recommendations for redress. The joint team of surveyors unanimously agreed on the beacons and boundaries for the respective counties at Mtito Andei and Mackinnon Road Town which is not in dispute. Suffices to say that the demarcation of the boundaries in issue will determine which county, between Taita Taveta and Makueni has jurisdiction over Mtito Andei Town; and which county, between Taita Taveta and Kwale, has jurisdiction over Mackinnon Road Town.

121. Therefore, I find the recommendation made by the National Land Commission that the boundaries between Counties of Makueni and Taita Taveta at Mtito Andei Town and Between Taita Taveta and Kwale Counties at Mackinnon shall be demarcated as prescribed in the Districts and Provinces Act of 1992 and the Second Schedule of the Act as outlined in the survey report as annexed to



the report being legally sound. The Joint survey team went to the ground and unanimously agreed on coordinates, beacons and physical features demarcating the boundaries. This will in turn achieve the second recommendation of ensuring that the residents of Mackinnon Road Town and Mtito Andei town are not subjected to double taxation; the boundaries having been clearly demarcated. Recommendations numbers (c), (d), and (e) were outside the scope of the instant Petition while recommendation number (f) was to be done as per the provision of article 188 of the Constitution. Parliament may consider enacting a legislation on the aspect.

122. In a nutshell, I discern that by and large the NLC and the team in as far as the issues of the surveying and boundaries meting the three Counties was concerned they were able to diligently and fully execute their mandate to the expectation of the honourable court. There is no doubt the there is still room for exploitation especially on aspects of historical and anthropological perspectives of the region is concern in accordance with the provision of article 67(1)(f) of the Constitution and which draws high expectations.

Issue No. d). Whether the cross petition by the 1st Interested Party / Cross Petitioner dated 18th September 2024 is competent/ has any merit?

123. Despite all odds and the express orders of this court, the 1st interested party acting desperate still proceeded on to file a cross – petition. But in all fairness, the court has decided not to ignore it but decipher through it. The said pleading placed reliance on the preamble, articles 2(5)(6) , 11, 21(3) 21(4) 22(1) 23(1), 27, 40(2), 44, 165 of the *Constitution* and *African Charter on Human Rights* on , *international covenant on civil and political rights and international covenant on Economic , social and cultural rights*.
124. The 1st interested party/cross petitioner states that the township of Mackinnon road town and whole of Taru up to Mbele is part of Taita Taveta. Mtito Andeyi, Mtito Andei is part of Taita Taveta. Conservancy comprising of 4000 Hectares of land otherwise referred to as Rombo conservancy bordering Kajiado county to the south western boundary is part of Taita Taveta. The boundary of Taita Taveta was marked and demarcated by the promulgation dated May 12, 1959 made by Sir. Evelyn Baring under Kenya colony protectorate which extended up to and including Mackinnon road town. In the year 1961 arbitrary decision was made by then District Commissioner Mr Af Holford Walker to transfer the administration of Mackinnon Road Township to Kwale adversely affecting residents giving birth to historical injustice. The 1st Interested Party states that the Taita people are aware of their boundaries historical background and customs. The 1st governor of Taita Taveta county set up boundary committee to collate views and advise on the status of the boundary disputes both internal as well as with neighbouring counties.
125. The 1st interested party makes reference to report of the NLC dated July 23, 2024 at paragraph 95(i). it states that this Court should order Parliament to set up a commission in order to determine and order the boundary of Taita Taveta County be reverted to Taru and including Mackinnon road town as it was before World War II.
126. The 1st interested party further claims over Mtito Andei township as forming part of Taita Taveta. It is its contention that the historical boundary of the people of Taita of Taita Taveta and Akamba of Makueni even before demarcation and land adjudication commences at Tanzania border through Tsavo west national park past Mzima springs along Mtito river crosses Nairobi – Mombasa highway at Mtito Andei river. The 1st interested party states that due to unresolved intercounty boundary disputes the county government of Makueni and Kwale have been illegally levying taxes on residents of Mtito Andei and Mackinnon road town. The 1st interested party prays for:-



- a. A declaration that sections 2, 5, and 16 of the Second Schedule to the District and Provinces Act is void and unconstitutional for violating the historical marked boundaries of the Counties of Taita Taveta, Makueni and Kwale.
 - b. A declaration that the people of Taita Taveta have a right to observe and maintain their traditional shrines which forms part of their cultural heritage
 - c. A declaration that the current boundary delimitation violates the constitution and cultural rights of the people of Taita Taveta
 - d. An order compelling parliament to finalize the delimitation of Counties of Taita Taveta and Kwale by reverting Mackinnon road town to Taita Taveta
 - e. An order compelling Parliament to demarcate the boundaries of the Counties of Taita Taveta and Makueni at Mtito Andei by restoring a territory measuring 52, 509 Acres to the County of Taita Taveta.
 - f. A declaration that the county government of Kwale and Makueni are liable to compensate the county government of Taita Taveta for all levies, license fees, property tax ad any money illegally collected from territory of Taita Taveta
 - g. A declaration that county governments of Kwale and Makueni are liable to refund to all traders in Mackinnon and Mtito Andei for any monies illegally collected from them
 - h. costs of the suit.
127. The gist of the cross petitioned is that the 1st interested states that there has been long standing boundary dispute between people of the County of Taita Taveta and Kwale at Mackinnon Road town as well as the Counties of Taita Taveta and Makueni at Mtito Andei as a result of unjust colonial laws and proclamations which were also continued after Kenya attained independence. The boundary dispute at Mackinnon road town arouse in the year 1961 when the colonial District Commissioner for the County of Taita Taveta , formerly Taita Taveta district wrote a letter to the district commissioner of Kwale purporting to transfer the whole of Mackinnon road town to Kwale. The transfer of administration of Mackinnon road town to Kwale was forcefully made without any consultation with the inhabitants of the area. Upon learning of transfer of Mackinnon road town to Kwale residents of Mackinnon road agitated for reversal of transfer. There were public barazas held in which people opposed the transfer. After facing a lot of resistance from the residents, the District commissioner and the coast Provincial Commissioner acceded to demands of residents and reversed the transfer. Since the transfer had been earlier gazette , the reversal was also to be gazette but it was never done . As a result of transfer of Mackinnon road town to Kwale and subsequent reversal of the transfer back to Taita Taveta a historical injustice was visited upon the people of Taita Taveta because people were evicted from their lands to pave way for construction of schools, churches and even military barracks.
128. The boundary dispute at Mtito Andei as codified in the Districts and Provinces 1992 followed colonial boundary demarcations which ignored the real and historical marked boundaries between the Taita people and Akamba people. The original boundary at Mtito Andei was a long the old – Nairobi highway. The boundary was also marked by traditional boundaries know as fighis which were cultural shrines of Taita People. Upon demarcation of the boundaries as per districts and provinces act, the cultural shrines of the Taita people were curved away from the territory of Taita Taveta. The 1st interested party states there is need to resolve the county boundary disputes and address the historical injustices that resulted from the current boundary demarcation to conform with the Constitution.



129. The Districts and Provinces act which current boundaries are demarcated is unfair, unjust and unconstitutional as it violates the economic and cultural rights of Taita people by taking away rights and shrines contrary to the provision of article 11(a) of the Constitution. Sections 2, 5 and 16 of the Second Schedule of the act perpetuates historical injustices suffered by Taita people violates article 43 by taking away their rightful resources and vesting them in another county denying Taita revenue and services to the people. To the 1st Interested party, although the petition is couched (sic) in a manner to appear like inter county boundary dispute which should be resolved by a tribunal under the provision of article 118 of the Constitution, the dispute is not just about boundaries. The dispute revolves around serious human rights violations stemming from historical injustices meted on Taita people and this court has jurisdiction to handle. Owing to historical injustices both the Counties of Makueni and Kwale, formerly respective districts have been illegally collecting and levying taxes on residents of Taita Taveta thus leading to double taxation contrary to articles 27, 40 and 209 (5). The 1st Interested Party prays the honourable to allow the Petition as modified in the Cross - Petition.
130. Before I delve further it is important to address my mind to the competency or otherwise of the cross petition filed by the 1st interested party. *The Constitution of Kenya (Protection Of Rights and Fundamental Freedoms) Practice And Procedure Rules, 2013.*
- “Interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.
131. The Supreme Court of Kenya in the case of “*Communications Commission of Kenya and 4 others v Royal Media Services Limited & 7 others Petition* No. 15 of [2014] eKLR where the court in defining who an Interested Party is held as follows:
- “An interested party is one who has a stake in the proceedings, though he or she was not party to the cause *ab initio*. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.
132. Rule 7 provides for two ways in which a person may be enjoined in proceedings as an interested party that:-
7. (1) A person, with leave of the court, may make an oral or written application to be joined as an interested party.
- (2) A court may on its own motion join any interested party to the proceedings before it.
133. To my mind, sub-rule 1 envisages a situation where a party moves the court either orally or through a formal application while sub-rule 2 refers to a situation which the court is of the view that it would be in the interest that a party be joined to proceedings as an interested party. In that case the court will, suo moto, make an order for a party to be joined.
134. In the instant petition, the petitioner in his own volition decided to include the County Governments of Taita Taveta, Kwale and Makueni as Interested Parties. Principally, the Petitioner is also seeking substantive orders against the respondents although the issue in question relating to boundaries affects the interested parties more than the Respondents. Be as it may be, a reading of rules 2 and 7 leaves no doubt that the petitioner has no right to sue a party as an interested party, it can only be against the respondent (s). Other parties will move the court or the court on its own motion can order a party be



added in the proceedings as an interested party. The Supreme Court observed in “*Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*, Civil Appeal No 290 of 2012 (paragraph 24):

“A suit in court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

135. The question that has not been well settled is whether a party on his/her/ its volition can sue a party as an interested party. This may present a situation which a party sues party/parties as interested parties in order to log out some issues being brought to the attention of the court. As it stands, the County Governments of Taita Taveta, Kwale and Makueni are all interested parties even if they were sued as such from the first instance. This court will proceed to treat them as interested parties.
136. Rule 15(3) of the said rules provides that the respondent may file a cross - petition which shall disclose the matter set out in rule 10(2). A clear reading of the said rule is that the respondent (s) is permitted to file a cross-petition. There is no other provision under the rules that permits an interested party to file a cross - petition. The question that arises is whether an interested party can file a cross - petition. Makau, J in the case of “*Jasper Ndeke Shadrack v Director of Public Prosecutions & another; Florence Wangari Hungi & 4 others (Intended Interested parties)* [2021],

“... the Constitution and the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure, 2013 has not provided for filing of cross-petition by an Intended interested party or interested party in the same Petition. The Intended interested parties were not at any time barred before seeking to be enjoined in these proceedings from filing their individual respective petitions without seeking to be enjoined and had they opted to do so they would have rightly exercised their constitutional rights to access justice. I find that it would be an abuse of court process for intended interested parties to seek to be enjoined as interested parties and at the same time file either a Petition or cross Petition in the same proceedings. I find the intended interested parties cross-Petition or Petition to be bad in law and warrants dismissal in limine.”

137. In dealing with the status of an interested party, the Supreme Court, by a majority, in the case of “*Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR expressed itself, inter alia, as follows:-

[40] In addressing the cross petition, the status of the 1st respondent in the High Court petition cannot be overlooked. The 1st respondent was admitted to the suit as an ‘interested party.’ The question then arises as to whether an ‘interested party’ has the capacity to institute a ‘cross - petition’. [50] The 2nd and 3rd respondents’ case in the High Court was made through a replying affidavit sworn on October 17, 2014 by the 2nd respondent, on behalf of herself and the 3rd respondent. She stated that the decision to allow the Muslim students to adorn hijabs was only meant to mitigate the animosity that had caused much unrest in the school, and to allow the students to settle down and prepare for national examinations.

- (51) The interested party’s case brought forth a new element in the cause: that denying Muslim female students the occasion to wear even a limited form of *hijab* would force them to make a choice between their religion, and their right to education: this would stand in conflict with



article 32 of the Constitution. It is on this basis that he cross-petitioned at paragraph 34 of his replying affidavit, for the Muslim students to be allowed to wear the *hijab*, in accordance with articles 27(5) and 32 of the Constitution

- (52) The cross - petition was expressed in straight terms: “I am swearing this affidavit in opposition to the petition herein for it to be dismissed with costs, and ... I am also cross-petitioning that Muslim Students be allowed to wear a limited form of *hijab* (a scarf and a trouser) as a manifestation, practice and observance of their religion consistent with article 32 of the Constitution of Kenya, and their right to equal protection and equal benefit of the law under article 27(5) of the Constitution.
- (53) What should we make of a cross - petition fashioned as such" Yet this court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the court. We did remark, in *Francis Kariuki Muruatetu & another v Republic & 5 others*, Sup Ct Pet 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
138. The learned judge went ahead to state that therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the court will always remain the issues as presented by the principal parties, or as framed by the court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the court. That stake cannot take the form of an altogether a new issue to be introduced before the court.
139. The 1st interested party seeks a declaration that the provision of sections 2, 5, and 16 of the Second Schedule to the District and Provinces Act is void and unconstitutional. I do not think a party can challenge the constitutionality of an Act of Parliament in the manner done by the 1st interested party. I note the cross - petition was filed late in the day when the petition was at the verge of determination. This has not accorded the Attorney General and Parliament an opportunity to respond to it effectively.
140. Be as it may be, the position taken by the Supreme Court in the case of “*Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR” is binding on this court. Consequently, I strongly discern that the cross - petition filed by the 1st interested party herein to be incompetent and the same is and hereby struck out.
141. Nonetheless, just for argument sake, assuming that I am wrong on the competency/incompetency of the 1st interested party’s cross petition. A cursory look of the issues raised by the 1st interested party relates to the constitutionality/unconstitutionality of sections 2, 5, and 16 of the Second Schedule to the District and Provinces Act for violating the historical marked boundaries of the Counties of Taita Taveta, Makueni and Kwale for codifying colonial boundary demarcations which ignored the real and historical marked boundaries between the Taita people and Akamba people. an order compelling parliament to finalize the delimitation of the Counties of Taita Taveta and Kwale by reverting Mackinnon road town to Taita Taveta. Further, the 1st interested party seeks an order compelling parliament to demarcate the boundaries of Taita Taveta and Makueni counties at Mito



Andei by restoring a territory measuring 52, 509 Acres to the County of Taita Taveta. The 1st interested party makes reference to report of the national land commission dated July 23, 2024 at paragraph 95(i). The 1st interested party states that this court should order parliament to set up a commission in order to determine and order the boundary of Taita Taveta county be reverted to Taru and including Mackinnon road town as it was before World War II.

142. The 1st interested party states that in the year 1961 arbitrary decision was made by then District Commissioner Mr Af Holford Walker to transfer the administration of Mackinnon Road Township to Kwale adversely affecting residents giving birth to historical injustice. The 1st interested party states that the Taita people are aware of their boundaries historical background and customs. The 1st governor of Taita Taveta county set up boundary committee to collate views and advise on the status of the boundary disputes both internal as well as with neighbouring counties.
143. The 1st interested party lays claims over Mtito Andei township as forming part of Taita Taveta. It is its contention that the historical boundary of the people of Taita Taveta and Akamba of Makueni even before demarcation and land adjudication commences at Tanzania border through Tsavo west national park past Mzima springs along Mtito river crosses Nairobi – Mombasa highway at Mtito Andei river. The 1st interested party states that due to unresolved intercounty boundary disputes the county government of Makueni and Kwale have been illegally levying taxes on residents of Mtito Andei and Mackinnon road town.
144. Essentially, what I hold that the 1st interested party is not satisfied with the current county boundaries as they are. The 1st interested party is aggrieved by the 1961 arbitrary decision was made by then District Commissioner Mr Af Holford Walker to transfer the administration of Mackinnon Road Township to Kwale. I understand the 1st interested party to be saying Mackinnon road town is in Kwale County but Mackinnon Road Town should be reverted back to Taita Taveta/the 1st interested party. I also understand the 1st interested party to be claiming 52, 509 Acres at Mtito Andei which is under Makueni County that it should revert back to its administration. I also understand the 1st interested party to be saying that the county boundaries are unfair for being based on unfair colonial boundaries. I say so having had the benefit to read the report by the National Land Commission which outlines the displeasure by the 1st interested party through its witness one Laban Tole Mwakireti Mbale and the County Surveyor as outlined at paragraphs 61 to 68 of the report.
145. From the foregoing, this court has to interrogate the issues raised in the petition against the issues raised by the 1st interested party in the cross - petition. Article 188 of the constitution on Boundaries of counties states:-
- (1) The boundaries of a county may be altered only by a resolution—
 - (a) recommended by an independent commission set up for that purpose by Parliament; and
 - (b) passed by—
 - (i) the National Assembly, with the support of at least two-thirds of all of the members of the Assembly; and
 - (ii) the Senate, with the support of at least two-thirds of all of the county delegations.
 - (2) The boundaries of a county may be altered to take into account—
 - (a) population density and demographic trends;



- (b) physical and human infrastructure;
- (c) historical and cultural ties;
- (d) the cost of administration;
- (e) the views of the communities affected;
- (f) the objects of devolution of government; and
- (g) geographical features.

146. Whereas the gist of the petition is demarcation, confirmation of boundaries and placing of visible beacons the 1st interested party has completely changed the dimension of the petition to include alteration of county boundaries. i say so looking at the prayers sought in the petition which I have reproduced as hereunder;

- a. A declaration that forcing the residents of Mtito Andei and Mackinnon Road towns to pay double taxes is a gross violation of the affected traders property rights under article 40(3) of the constitution
- b. A declaration that the double taxation the residents of Mtito Andei and Mackinon Road towns violates article 47(1) of the constitution.
- c. A declaration that the Parliament of Kenya should set up an independent commission to resolve the simmering boundary disputes pitting Taita Taveta County against Makueni and Kwale Counties
- d. A declaration that Parliament of Kenya should enact enabling legislation to implement articles 94(3) and 188 of the Constitution.
- e. A declaration that the national executive of Kenya has failed to lessen county boundary disputes by surveying and erecting visible beacons to clearly demarcate the boundaries of Kenya's 47 counties, pursuant to articles 129, 130, 131(1)(b) and 2(a) and (b) as read together with articles 6(1) and the first schedule to the Constitution.
- f. A declaration that the national executive of Kenya should survey and erect visible beacons to clearly demarcate the boundaries of Kenya's 47 counties pursuant to articles 129, 130, 131(1) (b) and 2(a) and (b) as read together with articles 6(1) and the first schedule to the Constitution.
- g. A mandatory order compelling parliament of Kenya to set up within three from the date of this order, an independent commission to resolve the simmering boundary disputes pitting Taita Taveta county against Makueni and Kwale Counties
- h. A mandatory order compelling parliament after the boundary disputes have been resolved to direct how county governments of Taita Taveta, Makueni and Kwale will utilize the money held in joint accounts opened for revenue collections in Mackinon road and Mtito Andei as ordered by the court at the beginning of the proceedings.
- i. A mandatory order compelling the parliament of Kenya to enact within 6 months from the date of this order enabling legislation to implement articles 94(3) and 188 of the constitution
- j. A mandatory order compelling the National Executive to within twelve months from the date of the order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 counties as per the districts and provinces act 1992 with preference being given to the



boundaries between Taita Taveta County and Makueni County on the one hand and Taita Taveta county and Kwale county on the other.

- k. A mandatory order compelling the national executive and Parliament of Kenya to file in this court affidavits demonstrating compliance with court orders at the expiry of the periods within which they have been ordered to act
 - l. A mandatory order compelling the respondents to pay the petitioners costs of the petition
 - m. Any other or further remedy that the court deems fit to grant.
147. I recall, the petitioner stated having received a letter from 178 residents of Taita Taveta to intervene to find as solution to the simmering boundary disputes which have persisted since pre independence. The petitioner seeks a mandatory order compelling the National Executive to within twelve months from the date of the order, survey and erect visible beacons clearly demarcating the boundaries of Kenya's 47 counties as per the districts and provinces act 1992 with preference being given to the boundaries between Taita Taveta County and Makueni County on the one hand and Taita Taveta county and Kwale county on the other. Further, the 1st interested party prays the honourable to allow the petition as modified in the cross petition. (emphasis supplied). I have said enough to demonstrate that the 1st interested party intends to change the course of the Petition from the issues raised by the petitioner.
148. This court takes note that at paragraph 19 of the report dated July 23, 2023, the petitioner clarified that he does not have interests as to where Mackinnon Road Town is situated and whether in Taita Taveta county or vice versa, to him , it would be a win - win situation that the citizens of the affected regions would have clear boundaries, thereby eliminating the issue of double taxation.
149. Clearly, the 1st interested party is not satisfied with the county boundaries as they are. The 1st interested party intends to have Mackinnon Road Town and some acres of Mtito Andei under its administration. That can only happen by altering the boundaries of the counties. Article 188 of the Constitution is available to the 1st interested party so long as it is done in full compliance of the Constitution. At this juncture this court will exercise judicial restraint as the process contemplated under article 188 is reserved for the Parliament unless there are sufficient reasons for the court to intervene.
150. At paragraph 89 of the ruling delivered on March 23, 2022 this court rendered itself: -
- “ 87. Clearly the petitioner and the respondents have misunderstood the dispute in question, whereas the petitioner have placed the instant dispute under articles 129, 130 and 188 of the Constitution, the respondents on the other hand are placing it under articles 88, 89 and 188 of the Constitution. The genesis of the issue before this court is about boundary dispute between two Counties, succinctly put which county/ counties does Mackinnon Road Town and Mtito Andei belong to? Article 188 of the Constitution deals exclusively with the process of altering county boundaries and the issue at hand in this matter is demarcation and confirmation of boundaries which the matter does not fall under the purview of article 188 of the Constitution.
 - 89. Therefore, to my mind, purposive interpretation of the constitution is to the effect that territorial county boundaries are fixed and can only be altered through the clear step provided by the Constitution in strict adherence to the provisions of article 188 of the Constitution.....”



151. The boundaries of counties cannot be altered by declaring the Districts and Provinces Act unconstitutional. It cannot also be altered through declarations made by the honourable court. It can only be altered through strict adherence to the Constitution. As already dealt with, the cross petition is struck out in entirety. I must state as per the constitutional architecture, a ward must be within a county. Several wards make up a county, further a Constituency must be within a county, several constituencies make up a county and finally Forty Seven counties make up a nation called Kenya.

Issue No. e). Whether the Honourable Court can entertain the dissatisfaction of the 1st Interested Party against the report of the National Land Commission dated July 23, 2024 on historical injustices in the instant Petition?

152. On historical injustices, the 1st interested party's case is said to have arisen in the year 1961 when the colonial District Commissioner for Taita Taveta County, formerly Taita Taveta District wrote a letter to the district commissioner of Kwale purporting to transfer the whole of Mackinnon road town to Kwale. As a result of transfer of Mackinnon road town to Kwale and subsequent reversal of the transfer back to Taita Taveta a historical injustice was visited upon the people of Taita Taveta because people were evicted from their lands to pave way for construction of schools, churches and even military barracks. The 1st Interested party states that the boundary dispute at Mtito Andei as codified in the Districts and provinces 1992 followed colonial boundary demarcations which ignored the real and historical marked boundaries between the Taita people and Akamba people.

153. At paragraph 80 the report by the NLC brings to the attention of this court that the 1st interested party already lodged two historical land injustices complaints with the commission pending determination. The NLC made a finding that there was no proof of historical land injustice claim in accordance with the provision of section 15 of the *NLC Act* as such this court humbly declines to assume jurisdiction and interrogate the issues therein. What is before this court is a constitutional petition and not an appeal.

154. Rule 2 of the *National Land Commission (Investigation Of Historical Land Injustices) Regulations* applies to historical land injustices that occurred between the June 15, 1895 and the August 27, 2010. In the instant case the 1st Interested party is aggrieved by the decision of the National Land Commission. As per rule 28, a person aggrieved by the decision of the Commission may, within twenty eight days of the publication of the decisions, appeal to the Environment and Land Court. The instant case is not an appeal and therefore this court cannot assume jurisdiction. The court can only exercise jurisdiction sitting on appeal against the decision of the National Land Commission.

Issue No. f). What are the appropriate reliefs that the Honourable court can grant in the circumstances?

155. The provision of article 23 of the *Constitution* gives this court authority to uphold and enforce the Bill of Rights.

- (1) The High Court has jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.
- (3) In any proceedings brought under article 22, a court may grant appropriate relief, including—



- (a) a declaration of rights;
- (b) an injunction;
- (c) a conservatory order;
- (d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under article 24;
- (e) an order for compensation; and
- (f) an order of judicial review.

156. It is not in doubt that this court is vested with constitutional authority to fashion appropriate reliefs as a remedy to peculiar circumstances arising. This court is the vanguard of the constitution, it has all the authority under the sun so long as it is exercised in accordance with the Constitution. There is nothing which this court cannot grant a relief. The Constitution uses the word “ a court may grant appropriate relief, including” To my mind, the list provided is not exhaustive.

The Supreme Court had occasion to consider the scope of Article 23(3) of the Constitution, as read with article 165(3)(d) of the Constitution in the case of “*Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*; Petition No 14, 14A, 14B and 14C of 2014 (Consolidated); The court stated:

“a close examination of these provisions (article 23(3) and 165(3)(d) of the Constitution) shows that the Constitution requires the court to go even further than the US Supreme Court did in the Marbury , and that article 23(3) grants the High Court powers to grant appropriate relief“ including” meaning that this is not an exhaustive list.”

157. Further to this, the Supreme Court in the case of “*Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) where they held that:-

“ 120. We are however, in agreement with the submissions of the appellant and *amicus curiae*, to the effect that article 23(3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right.

122. Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions.

158. I now turn to the instant petition bearing in mind the above authorities. The question is what are the appropriate reliefs which this court can fashion as an appropriate remedy. It is a fact that there are



several disputes pitting counties in respect of boundaries. This court cannot fold its hands particularly in the current constitutional dispensation. I have else where in this Judgement analyzed how current county boundaries came about. The county boundaries are as a result of the Districts and provinces Act 1992. This court will therefore fashion appropriate orders to resolve the boundary disputes in question.

159. In this judgement whereas the Petitioner has strived to ensure that county boundaries in respect of all the forty seven counties are demarcated and visible beacons placed this court will only deal with the boundaries mentioned in the petition involving Taita Taveta and Makueni and Taita Taveta and Kwale. It is contrary to the constitution and all natural rules of justice to make orders affecting counties who are not part of the proceedings.

160. In the case of “*David Dunsmuir v New Brunswick* (2008) 1 SCR 190 the Supreme Court of Canada observed:-

“The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law.”

161. As I come to the end of this Judgement, this honourable court wishes to sincerely express its deepfelt gratitude to the petitioner who is acting in person, the state counsel (s), all the Advocates for the respondents, the 1st, 2nd, 3rd & 4th Interested parties for their high level of professionalism in conducting this matter, well researched pleadings and submissions which by no means will contribute in building jurisprudence. I will not forget the NLC and its joint survey team also made insightful report which has assisted this court in rendering a sound determination in the Petition. Thank you.

162. Further, I urge Parliament to hasten the process of legislation on these issues. This court does not live in a vacuum. I am aware there has been several bills which have previously been tabled before the Senate on County Boundaries.

Issue No. g). Who will bear the costs of the Petition.

163. It is now well established that the issue of costs is the discretion of courts. Costs mean the award that is granted to one upon the conclusion of a legal action or proceedings in any litigation. According to the *Black Law Dictionary*, “Cost” is defined to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The provisions of section 27(1) of the *Civil Procedure Act*, cap. 21 holds that costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before court being a constitutional petition, rule 26(1) and (2) of the *Constitution of Kenya (Protection of Rights and fundamental Freedoms practice and Procedure Rules 2013)* provides: -

- “(1) The award of costs is at the discretion of the court.
- (2) In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms.”

164. In the case of:- “*Reids Hewett & Company v Joseph AIR 1918 cal 717*” and “*Myres – Versus - Defries* (1880) 5 Ex D 180”, the House of the Lords noted: -

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves



separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

165. Further, these legal principles were upheld in the Supreme Court case of:- “*Jasbir Rai Singh v Tarchalans Singh*, (2014) eKLR” and the Court of Appeal cases of “*Cecilia Karuru Ngayu v Barclays Bank of Kenya & ano.* (2016) eKLR” the courts held: -

“.....the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

166. With regard to the events in the instant case, the court holds that the petitioner herein has only partially succeeded in establishing his case on preponderance of probabilities. Critically speaking, and as has already noted, the petition is a unique one that raises such weighty and matters of great public interest and importance and whereby all the parties robustly made contribution. For that very fundamental reason, therefore, it is just fair, reasonable and realistic that each party bear their own costs.

XIII. Conclusion, disposition and final orders.

167. Ultimately, upon causing such an indepth analysis of the framed issues, the honourable court has to arrive at final decision based on the Preponderance of probability and the balance of convenience. Resolving boundary disputes must be done in the right context. The law does not operate in a vacuum and this court must rise to the constitutional standards set by the Constitution. Arising from the foregoing extensive analysis, to resolve monumental issues raised in the Petition and to resolve the County boundary disputes this court makes the following orders:-

- a. That Judgement be and is hereby partially entered in favour of the Petitioners herein under the following terms.
 - i. A declaration for the Parliament of Kenya to consider implementing the provision of articles 94(3) and 188 of the Constitution by enacting an appropriate legislation and/or through amendment of the *Districts and Provinces Act* 1992 and establish an independent commission to resolve the simmering boundary disputes affecting the 47 Counties within the Republic of Kenya including and the one pitting the County of Taita Taveta against Makueni and Kwale Counties Within The Next Twelve (12) Months from the date of delivery of this Judgement.
 - ii. The established Independent Commissions working in close conjunction with the National Executive to undertake comprehensive and intensive Land survey exercise and erect visible beacons clearly demarcating the boundaries of all the 47 Counties within the Republic of Kenya in accordance with the newly legislated law and/or Amended Districts and Provinces Act 1992.
 - iii. In the meantime, the boundaries between Counties of Taita Taveta County and Kwale at Mackinnon Road Town shall be demarcated as prescribed in the current legislation the Districts and Provinces Act of 1992 and the Second Schedule of the Act as outlined in the comprehensive Land Survey Report as annexed to the report by the National Land Commission dated July 23, 2024.



- iv. The boundaries between the County of Makueni and Taita Taveta County at Mtito Andei Town shall be demarcated as prescribed in the current legislation being the Districts and Provinces Act of 1992 and the Second Schedule of the Act as outlined in the survey report as annexed to the report by the National Land Commission dated July 23, 2024 prepared by Joint survey team.
- v. The Counties of Taita Taveta, Kwale and Makueni shall issue permits and levy county taxes strictly within their respective boundaries as demarcated and prescribed in the Districts and Provinces Act of 1992 and the second schedule of the Act and outlined in the survey report as annexed to the report by the National Land Commission dated July 23, 2024 prepared by joint survey team.
- b. That the County Executive Committee Members of finance for the Counties of Taita Taveta, Makueni and Kwale ordered to jointly file comprehensive statement in court within 90 days stating the amount of money collected; in default each County Executive Member shall be at liberty to file individual report (s) for further orders of the court.
- c. That the County Executive Committee Members of finance for Taita Taveta and Makueni Counties do jointly file comprehensive statement in court within 90 days stating the amount of money collected; in default each County Executive Member shall be at liberty to file individual report (s) for further orders of the court.
- d. That there shall be a mention of the matter on March 13, 2025 and to ascertain compliance of these directions, receive progress made and for other incidentals occurrences and any further directions.
- e. That the cross - petition by the 1st interested party dated September 18, 2024 be and is hereby found to be incompetent thus struck out in entirety with no orders as to costs.
- f. That each party be at liberty to move the court seeking any appropriate reliefs whatsoever.
- g. That each party do bear their own costs.

It is so ordered accordingly.

**JUDGEMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS,
SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF NOVEMBER 2024**

HON JUSTICE MR L.L NAIKUNI JUDGE

THE ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of:

M/s. Firdaus, the Court Assistant.

Mr. Okiya Omtatah - Okiiti the Petitioner acting in Person.

M/s. Sharon Mutua Advocate for the 1st Respondent.

Mr. Penda Advocate for the 2nd, 3rd Respondents & the 4th Interested Party.

Mr. Mwangi & Mr. Kipnetich Advocates for the 1st Interested Party.

Mr. Nyamodi Advocate for the 2nd Interested Party.

Mr. Eric Mutua Advocate for the 3rd Interested Party.

